TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 31.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLANTS,

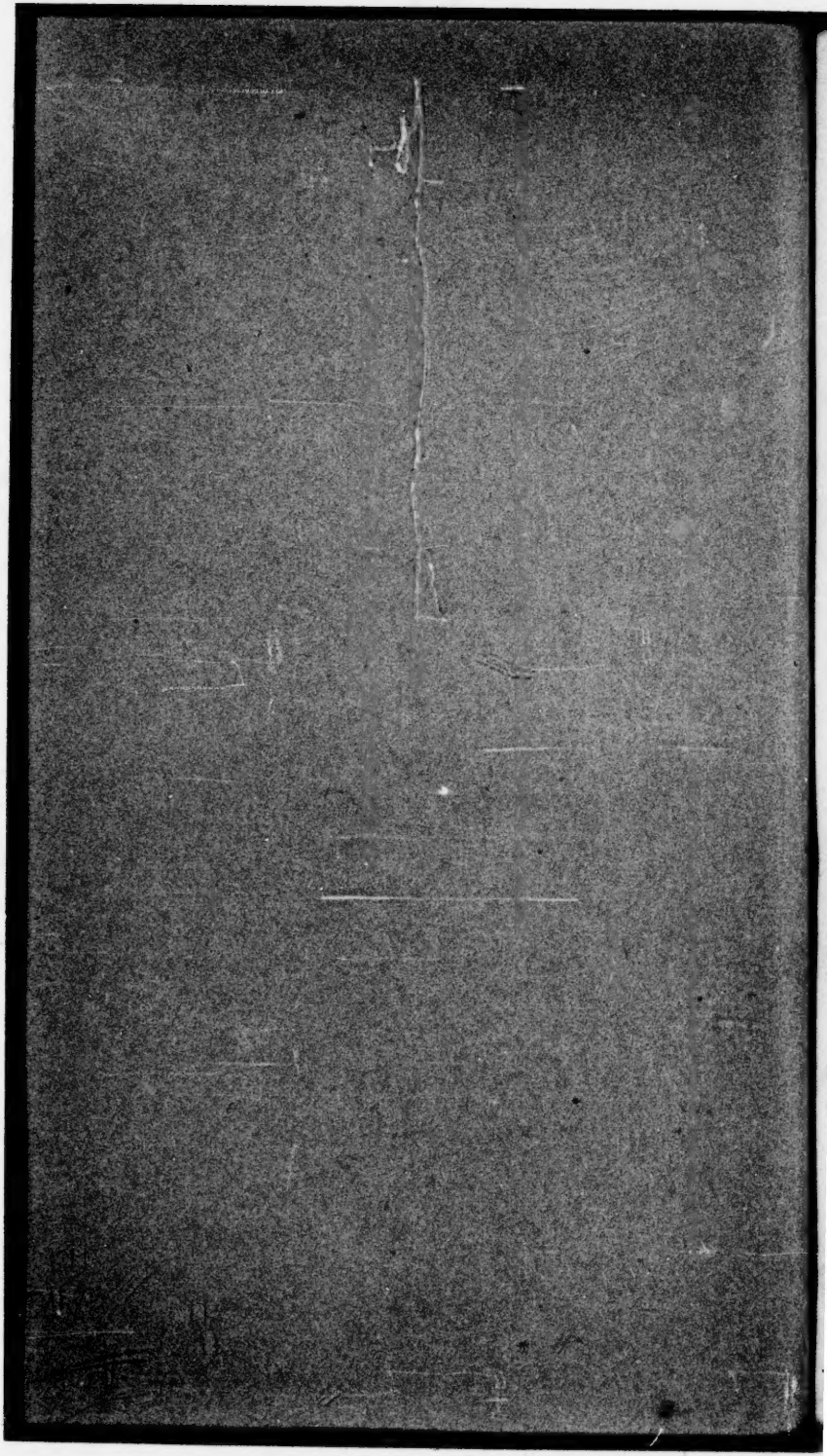
vs.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 11, 1912.

(22,097.)



(22,097)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 250

RMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLANTS,

vs.

RANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page.
ption	1
anscript from the supreme court of the District of Columbia	1
Caption	1
Bill	1
Exhibit 1—Certificate of entry of publication as second-class matter.	9
3—Copy of letter from A. L. Lawshe, Third Assistant Postmaster-General, to postmaster, New York, N. Y., enclosing opinion of the Assistant Attorney-General for Post-Office Department	10
4—Letter from E. M. Morgan, acting postmaster, to Messrs. Street & Smith, enclosing copy of letter from Third Assistant Postmaster-General revoking authorization	11
Rule to show cause	12
Marshal's return	12
Restraining order	12
Answer	13

UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 7, 1912.

	Page
Joinder of issue	2
Testimony on behalf of the complainants	2
Testimony of Ormond G. Smith	2
William Henry Heines	4
Orville J. Victor	5
James O. Spangler	6
Sinclair Tousey	8
Edward S. Ellis	9
Edward Stratemeyer	10
John C. Dana	11
Stipulation as to testimony	12
Testimony on behalf of defendant	12
Testimony of Harwood Mumford Bacon	12
Jackson A. Due	13
Zed H. Copp	13
A. L. Lawshe	14
Harwood M. Bacon	16
Testimony in rebuttal	16
Testimony of William H. Heines	16
Testimony in sur-rebuttal	17
Testimony of Harwood M. Bacon	17
Order substituting Frank H. Hitchcock as defendant	18
Final decree enjoining Frank H. Hitchcock, Postmaster-General, his agents and subordinates, from enforcing order of July 26, 1907	18
Appeal by defendant to Court of Appeals	18
Suggestion of interest of the United States	18
Suggestion of interest of United States as to taking appeal	18
Directions to clerk for preparation of transcript of record	18
Further directions for making up record on appeal	18
Memorandum: Time to file transcript of record in Court of Appeals extended	18
Stipulation as to exhibits	18
Clerk's certificate	18
Minute entries of argument	18
Opinion	18
Decree	19
Minute entry submitting motion to modify decree	19
Amended decree	19
Order allowing appeal	19
Bond for injunction pending appeal	19
Bond on appeal	19
Citation and service	19
Clerk's certificate	19
Assignment of errors	19

In the Court of Appeals of the District of Columbia.

No. 2059.

FRANK H. HITCHCOCK, &c., Appellant,
vs.
ORMOND G. SMITH et al.

a Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,
v.
FRANK H. HITCHCOCK, Postmaster-General of the United States.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,
v.
GEORGE VON L. MEYER, Postmaster-General of the United States.

To the Honorable the Supreme Court of the District of Columbia, sitting in Equity:

Your complainants, Ormond G. Smith, George C. Smith and Cora A. Gould, trading under the firm name of Street & Smith, respectfully show as follows:

I. Your complainants are all of them citizens of the United States

and residents of the State of New York, and bring this bill in their own right.

II. The defendant is a citizen of the United States and a resident of the District of Columbia, and said defendant is the duly appointed and qualified Postmaster-General of the United States and is herein sued as such Postmaster-General.

III. Your complainants are now, and during the times hereinafter
2 mentioned were, copartners engaged in the publishing business under the firm name of Street & Smith and had, and still have, a place of business in the city of New York in the State of New York. The publishing business of your complainants was established more than fifty years ago, during the whole of which time your complainants have been lawfully engaged in the business of publishing periodical publications similar to the one hereinafter specifically mentioned.

IV. Your complainants are now and were at the time of the acts of the defendant hereinafter complained of the sole owners, proprietors and publishers of the periodical publication hereinafter set out and, until the acts of the defendant hereinafter complained of such publication was from the date of its establishment, received and transmitted through the United States mails at the rates prescribed by law for periodical publications of the second class. The said publication and the date of establishment are respectively as follows:

Tip Top Weekly,

Established in 1897.

V. The said periodical publication is regularly issued at stated intervals as frequently as four times a year, to wit, at the stated intervals of once a week, bears the date of issue and is numbered consecutively, and has been so regularly and consecutively issued since its establishment to the present time.

The said publication has been and is now regularly issued from the known office of publication, to wit, the office of publication of
3 Street & Smith, 79 to 89 Seventh Avenue, City of New York, State of New York.

The said periodical publication is formed of printed paper sheets without board, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications. The said periodical publication is originated and published for the dissemination of information of a public character and is devoted to literature.

The said publication is not designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

The periodical publication has a legitimate list of subscribers.

Your complainants further say that the said periodical publication has complied, and now complies, with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class and that the said periodical publication is matter of the second class, and your complainants file herewith copy of said publication, which in respect to the requirements of mailable

matter of the second class is substantially similar to each and every other copy of said publication.

VI. The publication hereinbefore mentioned was, upon proper application, duly admitted by the Post Office Department of the United States to the second class of mail matter for transmission in the mails of the United States at the second class rates of postage provided by law for such matter; and in pursuance thereof the Postmaster of the United States at New York did execute, issue
4 and deliver to the complainants, in the case of said publication, a formal certificate of entry to the mails as second class matter as evidence of such determination, finding and decision that said publication was entitled to such transmission. The character of the publication has not since been changed.

A copy of said certificate of entry is hereto annexed, marked Exhibit 1, and is prayed to be read and considered as a part of this bill. The date of said certificate is March 1, 1897.

VII. From the date of said certificate of entry until the wrongful acts of the defendant hereinafter complained of said publication aforesaid was regularly, that is to say, every week, received and transmitted by the Post Office Department through the mails of the United States as mailable matter of the second class.

VIII. Long prior to the establishment of your complainants' publication aforesaid and prior to the passage of the act of March 3, 1879, publications similar in all respects to the publication aforesaid were regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class, and that such publications were, by all publishers, newsdealers and agents, as well as by the public in general, deemed, held and regarded to be periodical publications and were ordinarily and usually spoken of and treated as such, and that it was in the light of this universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other periodical publications that the
5 act of Congress of March 3d, 1879 was enacted and the definitions and conditions mentioned in said act were expressly intended and designed to include and embrace publications of the character of the one hereinbefore mentioned.

IX. In recognition of the universal understanding of the term periodical publications, as well as of the true intent and meaning of the said act of March 3, 1879, the Post Office Department did, from and after the passage of said act, admit, recognize, treat and transmit publications in all respects identical with the publication of your complainants through the mails as mailable matter of the second class and so continued to do until the 27th day of July, 1907, when the publication of your complainants was unlawfully and wrongfully excluded from the said second class.

X. Your complainants further say that at the present time and subsequent to the exclusion of your complainants' publication the said Post Office Department recognizes, admits and treats, under the said act of March 3, 1879, as publications of the second class, divers other publications similar to your complainants' publication

and in respect of no condition established by the said act of March 3, 1879, to be distinguished from them.

Your complainants further say that among the publications so admitted, held, treated and transmitted by the Post Office Department are the following publications, to wit, The Black Cat, the All Story Magazine, Smart Set, and divers other publications, copies of which your complainants respectfully crave leave to refer to as exhibits and parts of this bill at the hearing of this cause.

6 And your complainants further say that the exclusion of their periodical publication aforesaid under the circumstances just mentioned constitutes a denial of justice and a violation of the fundamental principle that the laws of the United States must be applied with equality to all citizens subject thereto; your complainants aver and complain that such exclusion denies to them the equal protection of the laws.

XI. On, to wit, May 17, 1907, your complainants received in respect to said publication, from the Third Assistant Postmaster-General, a letter or notice that they would be granted a hearing at the office of said Third Assistant Postmaster-General Washington D. C., at 2 o'clock p. m., on Tuesday, June 11th, 1907, to show cause why the authorization of the admission of such publication to the second class of mail matter under the act of March 3, 1879, should not be revoked and why the third class rate of postage should not be charged for the transmission of that class of mail, upon the following ground: That the issues of such publication do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12 and 14 of the act of Congress of March 3d, 1879 (chap. 180, I Supp. R. S., page 246) governing the mailable matter of the second class, but are in fact books, which, under section 17 of said act, are third class matter and chargeable, when sent in the mails, at the rate fixed by law for that class of matter. By said notice complainants were informed that their "answer, in writing, must be submitted on or before June 11th, 1907," and furthermore, that

"should they desire to avoid the expense and trouble incident

7 to a trip to Washington their written answer would be given the same full and painstaking consideration as though they appeared in person or by representative." A copy of said notice in the case of the Tip Top Weekly, is annexed hereto and marked Exhibit 2 and prayed to be read as a part hereof.

XII. In response to said notice your complainants did, by their representative, W. H. Heines, appear at the office of the Third Assistant Postmaster-General at 2 o'clock on June 10, 1907, and in anticipation of the hearing on the following day, filed a printed statement and argument in the case in which the points to be urged against such rule were briefly set out and in which your complainants stated that if the Third Assistant Postmaster-General should not be satisfied from the consideration of said printed argument that the issues of such publication constituted a periodical publication they requested a further opportunity to present argument. At the time of leaving said printed argument the representative of your complainants stated to the clerk of the Third Assistant Postmaster

POOR CO

General, the only person he could see, that he would return at the appointed hour on the following day, to wit, 2 o'clock p. m., June 11, 1907, to make further answer to the rule, and to participate in the hearing therein designated. On the day following, at the hour appointed in said citation, the representative of your complainants did appear at the office of the Third Assistant Postmaster-General in response to said rule to show cause, but he was unable to obtain an audience with or even to see the Third Assistant Post-

8 master-General. The representative of your complainants was, however, referred to the Superintendent of the Classification Division of the Post Office Department, who stated that he was not advised that he was to conduct a hearing and was unprepared to proceed with it. Neither in the office of the Third Assistant Postmaster General nor in the office of the Superintendent of the Classification Division was the representative of your complainants informed or advised beyond what was already contained in the so-called rule to show cause or any ground, reason, matter or thing which was to be urged against the right of the said publication to admission to second class matter or of any ground, reason, matter or thing to be alleged for their exclusion from said second class.

XIII. Your complainants believe that the proceedings aforesaid, had in the office of the Third Assistant Postmaster-General, do not constitute a hearing according to the provisions and within the intent and meaning of the act of March 3, 1901 (31 Stats. L., 1107) whereby it is provided:

"When any publication has been accorded second class mail privileges the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

And your complainants are further advised and aver that the action hereinafter mentioned purporting to be based upon a hearing granted to your complainants on June 11, 1907, constitutes a deprivation of the property of your complainants without due process of law.

XIV. On July 30, 1907, your complainants received from the Postmaster at New York a letter, under date of July 29, 1907, trans-

9 mitting to your complainants a letter from the Third Assistant Postmaster-General, revoking the authorization for mailing the publication aforesaid at the second class rates of postage. Also a copy of the opinion of the Assistant Attorney General for the Post Office Department referred to in the letter of the Third Assistant Postmaster-General. By the said letter the said Postmaster notified your complainants that any copies of that publication mailed thereafter would be subject to the postage rate for third class matter, one cent for each two ounces or fraction thereof, which must be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies. Copy of said letter is hereto annexed, marked Exhibit 3, and prayed to be read and considered as a part of this bill.

Copy of the letter of the Third Assistant Postmaster-General referred to in letter of the Postmaster recited, under date of July 26, 1907, that the Assistant Attorney General for the Post Office De-

partment, upon consideration of the arguments of the counsel
the publishers (by which your complainants suppose was meant
statement and argument submitted as aforesaid) had held that
publication in question was not a "periodical publication" wit
the meaning of the law, but "Books," and therefore not entitle
transmission at the second class rates of postage. The Third As
ant Postmaster-General proceeded to state that in that opinion
concurred, and accordingly decided that the issues of the "Tip
Weekly," do not constitute newspapers or other periodical publ
tion as required by sections 7, 10, 12 and 14 of the act of Congre
March 3, 1879 (chap. 180, I Supp. R. S., page 246), gov
10 ing "mailable matter of the second class but are, in
books which, under section 17 of said act, are third class
ter, chargeable when sent in the mails at the rate fixed by law
that class of mail matter. And that therefore the authority gra
for the acceptance of said publications for mailing at the sec
class rates of postage is hereby revoked."

A copy of said letter of the Third Assistant Postmaster-Genera
hereto annexed, marked Exhibit 4, and prayed to be read and
sidered a part of this bill. Enclosed in the said letter of the
master transmitting the decision of the Third Assistant Postma
General was the opinion of the Assistant Attorney-General for
Post Office Department referred to therein, upon the question of
whether your complainants' publication complied with the requ
ments of the act of March 3, 1879.

XV. Your complainants further aver that the question whe
the said publication is a periodical publication within the mea
of the law and therefore entitled to transmission as second class
ter is a pure question of law, to be determined by a comparison
the said publication itself with the conditions set out in the said
of March 3, 1879.

Your complainants further aver that the decision of the said T
Assistant Postmaster-General that the issues of the said publica
as required by sections 7, 10, 12 and 14 of the said act, is a mat
error of law, and should not avail to deprive your complainant
the right to the transmission of said publication through the
of the United States in accordance with the requirements, terms
provisions of said act.

11 Your complainants further aver and say that the said
posed decision of the Third Assistant Postmaster-Gen
purporting to be based upon a construction of said act of M
3, 1879, is simply an arbitrary, capricious and unlawful conclus
imposing upon the right to such transmission unspecified and
defined requirements in excess of and in addition to those establi
by the statutes of the United States, and unauthorized by the st
under which he assumed to act and wholly beyond his power
jurisdiction.

Your complainants further aver that in pronouncing the deci
aforesaid the said Third Assistant Postmaster-General proceeded
no evidence or facts before him other than those apparent by a
parison of the publication itself with the requirements of
statute.

And your complainants are advised and believe that such decision, being a clear mistake of law as applied to the apparent and admitted facts, is absolutely null and void, and this honorable court has accordingly power and jurisdiction to grant relief against the same.

XVI. Your complainants further show that the Postmaster of the United States for the City of New York, in pursuance of said supposed decision of said Third Assistant Postmaster-General, immediately refused to accept the current issues of the publication aforesaid, for mailing in said postoffice at the second class rates of postage, and threatens now and hereafter at each successive issue of said publication to refuse to accept the same at said second class rates of postage.

12 XVII. Your complainants further show that the publication aforesaid is a periodical publication, complying with all the conditions and requirements established by law for the admission of publications to the second class of mail matter, and is a periodical publication within the intent and meaning of the said act of March 3, 1879, and therefore entitled to transmission as such. That the periodicity of the issue of said publication is real and not apparent, that the demand for said publication is a periodical demand, and that such demand can be met only by a periodical issue. That such publication has not only a legitimate list of subscribers, within the intent and meaning of the act of March 3, 1879, but has, as a part thereof, a number of individual reading subscribers who subscribe for the same for the periods for which subscriptions to periodical publications are usually taken; that the periodicity of said publication is an essential element of its character, and that if the said publication is denied admission to the mails as a periodical publication, it would be impossible for your complainants to continue the publication thereof or to meet by any other form of publication the demand therefor. The said publication can be furnished to the subscribers and readers thereof only by means of the recognized news agencies and through the mails of the United States; that if the second class mailing privilege is taken away from said publication your complainants will be unable to send said publication to various parts of the United States where the only possible means of communication with the subscriber is through the mails of the United States, and such exclusion from the mails will amount to an absolute prohibition and interdict upon the circulation

13 and distribution of said publication.

XVIII. Your complainants further aver that the said publication is principally devoted to literature and contains, in each successive issue thereof, continued juvenile fiction of literary merit; that such literature is pure and wholesome in tone and so far as it deals with adventure deals with it in the same way and in the same spirit that it is dealt with by the recognized masters of juvenile fiction. Your complainants further aver that the contents of said publication in no respect contravene any provisions of the postal or other laws of the United States.

XIX. Your complainants, relying upon the right to have the said publication transmitted through the mails of the United States upon no other condition than compliance with the Statutes of the United States in that regard, have proceeded from time to time to invest

large sums in the conduct, management and development of the business of printing and publishing said weekly publication; to that end, they have, at great expense, installed machinery and appliances suitable for no other purpose than the production of said publication; that if the said invalid order of the Third Assistant Postmaster-General is put into execution by the Postmaster at New York, not only will your complainants be compelled to suspend the publication of said publication, but the machinery and appliances aforesaid will become wholly useless to your complainants and your complainants will be deprived of the value of the same, which value is in excess of the sum of ($5,000) Five Thousand Dollars.

14 XX. Your complainants say that their right to the transmission of their publication through the mails of the United States at the second class rates of postage is a right of property dependent solely upon the laws of the United States in that regard, and that the decision of the Third Assistant Postmaster-General aforesaid, proceeding upon a clear mistake of law and imposing, as it does, unnamed and unspecified requirements beyond compliance with the provisions of the statutes of the United States will, if the same be put into execution by the Postmaster of the City of New York, as he now threatens to do, take from your complainants the right conferred upon them by the said statutes to the transmission of the publication aforesaid, and thus deprive them of their property without due process of law, contrary to the provisions of the Constitution of the United States in that regard.

And your complainants further aver that the said property right to the transmission of the said publication at the second class rates of postage, irrespective of the value of the machinery and appliances aforesaid, exceeds in value the sum of Five Thousand Dollars ($5,000).

For as much as your complainants are without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your complainants pray

1. That the United States writ of subpœna may issue to the defendant, commanding and enjoining him to appear at a date named therein and answer the exigencies of this bill.

15 2. That your complainants may be declared entitled to have the publication aforesaid entered, received and transmitted through the mails as mailable matter of the second class under the provisions of the act of Congress approved March 3, 1879, and at the rates provided by law for mailable matter of that class.

3. That it may please this honorable court to issue an injunction restraining the defendant, his agents and subordinates, from revoking the authority heretofore granted for the acceptance of the publication hereinbefore mentioned, for mailing at the second class rates of postage, and requiring and commanding said defendant, his agents and subordinates to receive the current issues of said publication as they appear and transmit the same from week to week through the mails of the United States as mailable matter of the second class and at second class rates.

4. That it may please the court also to grant a preliminary restraining order and injunction, restraining the said defendant, his

POOR COPY

agents and subordinates, as hereinbefore prayed, during the pendency of this suit.

5. That your complainants may have such other and further relief as in equity they may be entitled to and as to the court may seem meet and proper.

GEORGE C. SMITH,
ORMOND G. SMITH,
CORA A. GOULD.

By Their Solicitor, H. H. GLASSIE.

H. H. GLASSIE,
J. J. DARLINGTON,
Sol'rs for Complainants.

16 UNITED STATES OF AMERICA.
State of New York, City and County of New York:

I, George C. Smith, being first duly sworn, depose and say that I am one of the complainants in the foregoing annexed bill described by me, and I have read the same and know the contents thereof, and that the same are true, to my knowledge, save only as to matters therein stated upon information and belief, which said matters I believe to be true.

GEORGE C. SMITH.

Sworn to and subscribed before me this 6th day of August, 1907.
[SEAL.] CHARLES W. OSTERTAG,
Notary Public, County of New York.

17 EXHIBIT I.

(3505.)

Certificate of Entry of Publication as Second-Class Matter.

POST OFFICE AT NEW YORK, N. Y., *March* 1, 1897.

I hereby certify that the Tip Top Weekly a Weekly published at this place, has been determined by the Third — Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. W. DAYTON, *Postmaster.*
P'r E. S. POST.

18 Post Office Department.
Third Assistant Postmaster General.
Division of Classification.

WASHINGTON, *May* 17, 1907.

Publishers of the Tip Top Weekly, New York, N. Y.

SIRS: You are hereby notified that, in accordance with the Act of Congress approved March 3, 1901 (Ch. 851, 31 Stats., at L., 1107),

you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at 2:00 P. M., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip Top Weekly to the second class of mail matter under the Act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, upon the following ground:

That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12, and 14 of the Act of Congress of March 3, 1879, (Ch. 180, 1 Supp., R. S., page 246), governing "mailable matter of the second class," but are in fact books, which, under Section 17 of said Act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Your answer, in writing, must be submitted on or before June 11, 1907.

19 Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

A. L. LAWSHE.

20 EXHIBIT 3.

(Copy.)

C. D.
111462 113162
113161 113163

O. N. 31271

Post Office Department,
Third Assistant Postmaster General,
Division of Classification.

WASHINGTON, *July* 26, 1907.

Postmaster, New York, N. Y.

SIR: In connection with the rule to show cause, you are informed that a hearing was given to the publishers of the "New Nick Carter Weekly," "Buffalo Bill Stories," the "Tip Top Weekly" and "Diamond Dick, Jr.," at this Office on June 11, 1907.

The arguments of the counsel for the publishers were considered and submitted to the Assistant Attorney General for the Post Office Department, who held that the publications in question were not "periodical publications" within the meaning of the law, but "books," and therefore not entitled to transmission at the second class rates of postage.

In this opinion I concur and accordingly decide that the issues of the "New Nick Carter Weekly," "Buffalo Bill Stories," the "Tip Top Weekly" and "Diamond Dick, Jr.," do not constitute newspapers or other periodical publications as required by sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879 (ch. 180, 1 Supp., R. S.,

POOR CO

page 246), governing "mailable matter of the second class,"
21 but are in fact books, which, under section 17 of said act, are third class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Therefore, the authority granted for acceptance of the "New Nick Carter Weekly," "Buffalo Bill Stories," the "Tip Top Weekly" and "Diamond Dick, Jr.," for mailing at the second class rates of postage is hereby revoked and you are directed to enter that fact upon the records of your post office.

You will require postage at the third class rate—one cent for each two ounces or fraction thereof—to be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies of the publication hereafter mailed at your office.

A copy of the opinion of the Assistant Attorney General for the Post Office Department referred to is herewith enclosed to be handed to the publishers for their information.

Respectfully,

(Signed) A. L. LAWSHE,
Third Assistant Postmaster.

M-F.

22 EXHIBIT 4.

UNITED STATES POST OFFICE,
NEW YORK, N. Y., *July* 29, 1907.

2 Encs.

Messrs. Street & Smith, 79 Seventh Avenue, New York, N. Y.

GENTLEMEN: I hand you herewith a copy of a letter from the Third Assistant Postmaster General revoking the authorization for mailing the "New Nick Carter Weekly," "Buffalo Bill Stories," "Tip Top Weekly," and "Diamond Dick, Jr., Boys Best Weekly" at the second class rates of postage, also the copy of the opinion of the Assistant Attorney General for the Post Office Department referred to in the letter of the Third Assistant Postmaster General.

Any copies of these publications hereafter mailed will be subject to the postage rate for third class matter—one cent for each two ounces or fraction thereof—which must be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies.

You are also informed that no notice of entry as second class matter should appear in copies hereafter issued or mailed.

Very respectfully,

E. M. MORGAN,
Acting Postmaster.

Per E. S. POST.
Acting Assistant Postmaster.

M-F.

23 *Rule to Show Cause.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Eq. 27279.

ORMOND G. SMITH, GEORGE C. SMITH and CORA A. GOULD, Trading Under the Name of Street and Smith,

v.

GEORGE VON L. MEYER, Postmaster General.

Upon consideration of the bill of complaint and the application for an injunction pendente lite it is this 8th day of August 1907 ordered that the defendant show cause on Monday August 12th at ten o'clock a. m. why an injunction pendente lite should not be granted as prayed.

Provided that a copy of this order and the bill of complaint be served upon the defendant or the acting Postmaster General on or before Friday August 9th, 1907.

JOB BARNARD, *Justice.*

Marshal's Return.

Served copy of the within order, together with copy of the bill of complaint, on George von L. Meyer, Postmaster General of the U. S. by service on A. L. Lawshe, acting Postmaster General.

August 8, 1907.

AULICK PALMER,
Marshal.

S.

24 *Restraining Order.*

Filed August 12, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH et al., Trading under the Name of Street & Smith, Complainant-,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the bill of complaint of the above named complainants and the rule to show cause issued thereon on August 8, 1907, and upon the appearance of the Attorney of the United States

POOR COPY

for the District of Columbia in response to said rule, it is this 12th day of August, 1907, by the court

Adjudged and ordered that the defendant, the Postmaster General, his assistants, deputies, agents and subordinates, be and they are hereby restrained and enjoined, until the further hearing of this cause upon motion of either party from revoking the authority heretofore granted for the acceptance of the publication "Tip Top Weekly" for mailing at the second class rates of postage, and that the said defendant, his assistants, deputies, agents and subordinates be and they are hereby restrained from refusing to accept said publication for mailing at the second class rates of postage and from interfering with the transmission of the same at said second class rates
25 under the provisions of the certificate of entry of March 1, 1897. Provided that the complainants give the usual undertaking required by Equity Rule No. 42.

JOB BARNARD, *Justice.*

Answer.

Filed November 5, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,

v.

GEORGE VON L. MEYER, Postmaster General of the United States.

This defendant now and at all times hereafter, reserving all and all manner of benefit and advantage to himself of exception to the many errors and insufficiencies in said bill contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto; answers and says:

I–III.

This defendant admits the allegations of paragraphs one, two, and three of the bill of complaint, with the exception of the allegation of paragraph three that complainants have been since the establishment of their publishing business, more than fifty years
26 ago, "lawfully engaged in the business of publishing periodical publications similar to those hereinafter specifically mentioned," the import of which is that the publication entitled "Tip Top Weekly" is a periodical, and this he denies, and avers that while the publishing business of complainants may have been established more than fifty years ago, as stated, said publication is not a periodical, but is in fact a book.

IV.

This defendant is informed and believes that the complainants are now and were at the time of the acts complained of, the sole

owners, proprietors and publishers of the publication entitled "Tip Top Weekly;" that said publication was from the date of its establishment, to-wit, the year 1897, received and transmitted through the United States mails at the rates prescribed by law for matter of the second class, but denies that said publication is a periodical and avers on the contrary that it is in fact a book.

V.

This defendant is informed and believes that the publication designated "Tip Top Weekly" is regularly issued at stated intervals as frequently as four times a year, to-wit, at the stated interval of once a week, bears the date of issue, and is numbered consecutively, and for aught that he knows to the contrary has been so regularly and consecutively issued since its establishment to the present time; and has been and is now so regularly issued from the known office of publication of the complainants; and admits that said publi-
27 cation is formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications. But this defendant avers that although said publication be regularly issued from the known office of complainants as frequently as four times a year, and be numbered consecutively and be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications, and thus complies with the outward characteristics and conditions prescribed by law for mailable matter of the second class, nevertheless, internally, in substance and in general contents it does not have the characteristics of said class of mail matter, but is in fact a book, and as such is included in the third class of mail matter as designated by law.

This defendant further avers that said publication does not have the characteristics of the second class of mail matter as prescribed by law, in that there is no connection between the different numbers thereof in the nature of the articles appearing in them, and in that the publication implies no continuity of literary character, such as distinguishes periodical publications from books, but each publication, issue or so-called number is complete in itself, and save outwardly indicates no relation with prior or subsequent numbers, issues or publications; and that the only connection of the successive issues one with another is that each bears the title "Tip Top Weekly," and the issues as they appear are numbered consecutively;
28 all of which will appear by an examination of the copies of the publication filed with the said bill and with this answer as a part hereof, marked Exhibits A, B, C, D, and E.

This defendant denies that said books are originated and published for the dissemination of information of a public character; and while it may be true that each of said books may be a work of literature itself, the defendant denies that the said books or any of them are devoted to literature in any proper or legal sense, or within the meaning of the Act of March 3, 1879. For aught that this defendant knows to the contrary, none of the said books so issued was or is designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

POOR COP

This defendant does not know of his own knowledge, and therefore can neither admit nor deny that the said "Tip Top Weekly" has a legitimate list of subscribers; but if this fact be competent for inquiry by this court, and be material, demands strict proof of the same. This defendant is informed and believes and avers, that none of the said several books or novels published under that designation are sent through the mails to individuals who subscribe for them for any period of time, but that all, or practically all, of the copies of each of said books or novels so published are by the complainants, either directly or through agents, distributed to news agents or news dealers, who in turn sell them as books, singly and without relation to the other books or novels likewise published under the same designation. And this defendant says that by reason of the manifest character of these publications as books, and not
29 as successive parts of a continuous periodical, neither he nor his predecessors was ever called upon officially to inquire and determine whether or not the alleged periodical known as "Tip Top Weekly" had a legitimate list of subscribers; and he further submits that if the supposed right of complainants to transmit books published under the designation "Tip Top Weekly" is in any wise dependant upon the existence of a legitimate list of subscribers, the question of the extent of such list is one of fact, for the cognizance of the Postmaster General.

Further answering the allegations contained in paragraph five, this defendant denies that the publication designated "Tip Top Weekly" has complied or is complying with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class and denies that said publication is matter of the second class as alleged.

VI-VII.

This defendant is informed and believes, that the allegations of paragraphs six and seven are true, with the exception of the allegation that the acts of this defendant were wrongful; and this he denies and says that he is informed and believes that said acts were lawful and just, and wholly within his authority and jurisdiction.

VIII.

This defendant is not informed as of his own knowledge of the conditions and circumstances surrounding the passage of the Act of March 3, 1879, and can neither admit nor deny the allega-
30 tion that publications similar to "Tip Top Weekly" were as alleged, regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class prior to said act; but this defendant denies that such publications have been at any time heretofore, or now are, by all publishers, news dealers and agents, as well as by the public in general, deemed, held, and regarded to be periodical publications and were ordinarily and usually spoken of and treated as such; and denies that it was in the light of such alleged universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other

periodical publications that the Act of Congress of March 3, 1879 was enacted; and denies that the definitions and conditions mentioned in said Act were expressly intended and designed to include and embrace publications of the character of "Tip Top Weekly."

This defendant submits that said Act was not intended, and the definitions and conditions mentioned therein were not intended and designed, either expressly or otherwise, to include and embrace publications of the character of that in respect of which this complainant has been excluded from the second class mailing privilege, to-wit: the publication entitled "Tip Top Weekly," but that said Act had in contemplation publications such as are commonly known as newspapers and magazines, published periodically—that is to say, at regular intervals, either daily, weekly, monthly or quarterly, for
the dissemination of news and other information of instruc-
31 tive or educational value, or devoted to literature, or to the arts, sciences, or special industries; and that the circulation of publications of the class of "Tip Top Weekly," which have the characteristics of books and by section seventeen of said Act are designated as mailable matter of the third class, which, moreover, are not "devoted to literature," and if literature themselves are of an inferior order thereof, was not designed or intended to be encouraged by the extension to them of the special privileges authorized by sections 7, 10, 12 and 14 of said Act.

IX.

This defendant can neither admit nor deny the allegation that the Post Office Department did from and after the passage of said Act of March 3, 1879, admit, recognize, treat and transmit publications in all respects identical with the publication of complainants, but denies that such course, if pursued by said Department as alleged, was in recognition of any universal understanding of the true intent and meaning of said Act. This defendant is informed, and so believing avers, that very many publications similar in their general characteristics to the publication of complainants were received and transmitted in the mails by the Post Office Department as matter of the second class prior to November, 1901, but that such classification and treatment of such publications were quite generally criticised as an abuse of the privileges accorded to periodical publications by said Act, and contrary to its true intent and purpose; and says that
since said time very many such publications have been ex-
32 cluded from the second class of mail matter, and none such has been entered as matter of said class. This defendant is further informed and so believing avers, that such publications were received and transmitted as matter of the second class under mistake by said Department both of law and fact, and he is in no wise bound thereby.

This defendant denies that the publication of complainants was on the 27th day of July, 1907, unlawfully and wrongfully excluded from the second class of mail matter, and avers on the contrary that the order of said date excluding said publication from the mails as matter of the second class was lawfully and regularly issued in due course and after hearing given to the complainants.

POOR COPY

X.

This defendant denies that the publications referred to by complainants as "The Black Cat," the "All-Story Magazine," and the "Smart Set" are similar in respect of all the conditions established by said Act of March 3, 1879, to the publication of complainants and not to be distinguished therefrom; and he denies also that the exclusion of said publication from the second class of mail matter constitutes a discrimination against said publication or a denial of justice to the complainants, or a violation of the fundamental principle that the laws of the United States must be applied with equality to all its citizens, and that by said exclusion the complainants are deprived of the equal protection of the laws. This defendant avers on the contrary that the exclusion of the said publication was in conformity with the policy of the Post Office Department, established about November, 1901, and designed to carry out the provisions of the Act of March 3, 1879; and that in pursu-
33 ance of said act and policy, no publications possessing the characteristics of books may be received as matter of the second class and so transmitted in the mails, but that all such publications shall be classified according to their substance and real character and admitted to the mails for transmission as matter of the third class in pursuance of Section 17 of said act, and that since said time all such publications have been and are being excluded from the second class of mail matter in the usual course as they come to the attention of the Post Office Department.

XI.

This defendant admits the allegations of paragraph eleven, except as to the statement that "by said notice complainants were informed that their 'answer in writing must be submitted on or before June 11, 1907,'" and this he denies and avers that said hearing was fixed for Wednesday, June 12, 1907.

XII.

This defendant is advised, and so believing avers, that on June 11, 1907, counsel for complainants, to-wit, W. H. Heines, Esq., appeared at the office of the Third Assistant Postmaster General and stated to his secretary that he desired to see that officer in reference to the publication of complainants which had been excluded from the second class of mail matter; that counsel was informed by said secretary that the Third Assistant Postmaster General was
34 engaged, or was not at that moment in his office; that counsel left with the statement that he would call the next following day; that on the next day, to-wit, June 12, he called again at the office of the Third Assistant Postmaster General, and his said secretary on going to the room of that officer, found him engaged in a conference; that on being informed that counsel representing complainants in the matter of the exclusion of their said publication had called and desired to see him, the Third Assistant Postmaster General directed his secretary to invite counsel to call on the

Superintendent of the Division of Classification and to instruct said Superintendent to go over with him any matter that he desired to discuss with reference to said publication, note his appearance in response to the citation issued on May 15, 1907, to complainants to show cause why their said publication should not be denied transmission in the mails as matter of the second class, and that if after conferring with said Superintendent, counsel desired to see the Third Assistant Postmaster General personally, the latter would see him; that this defendant is informed and believes that said secretary fully carried out these instructions; that counsel submitted to said Superintendent in answer to said citation, a printed statement and argument on behalf of the complainants, to a copy of which printed statement and argument annexed as "Exhibit F, this defendant craves leave to refer as showing that it is responsive to said citation and undertakes to answer the charge of the Third Assistant Postmaster General that the publication of complainants in question, to-wit, "Tip Top Weekly" was not a periodical publication as designated and defined by the Act of March 3, 1879, but that
35 the respective numbers thereof were in fact books. This defendant is further informed and believes that said Superintendent of the Division of Classification later advised the said secretary of the Third Assistant Postmaster General by telephone that counsel for complainants had called and he had noted his appearance; and that at the same time said Superintendent inquired whether the Third Assistant Postmaster General desired to see counsel; that said secretary replied that he did not unless counsel desired to see him as he had nothing special to say to him; and that the said Superintendent replied that counsel for complainants did not have anything further which he desired to communicate to the Third Assistant Postmaster General. This defendant is advised and so believing avers that it was and is the understanding of the Third Assistant Postmaster General and of the Superintendent of the Division of Classification that counsel for the complainants desired the printed argument submitted on behalf of the complainants to be taken as their answer to the citation issued by the Third Assistant Postmaster General and that counsel did not desire to be heard orally in respect of said citation, but had included in the said printed argument the full reply of complainants in the premises.

This defendant avers that by the regulations of the Post Office Department (Edition of 1902), section 19, paragraph 8, said Superintendent of Classification "is charged with the consideration of all questions relating to the classification of matter admissible to the mails, including the determination of the admissibility of publications to the second class of mail matter and their right to con-
36 tinue therein," and that the duties so assigned to him by necessary implication include general authority to hold hearings of the character required by the Act of 1901; and is advised and believes that said Superintendent was moreover specifically instructed by direction of the Third Assistant Postmaster General to hear counsel for the complainant in response to said citation in respect of "Tip Top Weekly," and that in pursuance of such instruction re-

POOR COPY

ceived the printed statement and argument prepared in answer to said citation, and offered to receive and did receive all other papers and matters submitted by counsel in their behalf, and offered to hear counsel at length orally if desired. But this defendant is further advised and believes that the Third Assistant Postmaster General was ready and willing nevertheless to hear counsel orally and fully on the day fixed in said citation, to-wit, the 12th day of June, 1907, and that counsel had full opportunity to be so heard on said day had he so desired.

XIII.

This defendant is informed and believes that before the issuance of the order excluding said publication of complainants from the second class of mail matter, full opportunity was given complainants and their counsel to be heard and that there was in fact a hearing in respect of said matter, conforming in all respects with the intent and purpose of the Act of March 3, 1901 (31 Stat. L. 1107).

This defendant is further informed and so believes and avers that the privilege of having publications complying with the
37 conditions of second class matter as defined in the Act of March 3, 1879, transmitted at the second class rate of postage is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and its determination is within the judgment and discretion of the Postmaster General for the time being; and is further advised, and so believing avers, that there was in the case of this publication, no deprivation of property of the complainants.

XIV.

This defendant admits the allegations of paragraph fourteen, and says that it was his duty to examine into all the facts and circumstances which determine whether the publication of complainants complies with the statutory conditions for acceptance at the second class postage rates, and as the result of the inquiry into such facts and circumstances on and after hearing to complainants as aforesaid, this defendant, acting through the Third Assistant Postmaster General, has found said publication not to be entitled to admission to the mails at the second class rate; and says that it is his intention in pursuance of such finding and unless restrained by this court, hereafter to decline to receive said publication for transmission in the mails at said rate of postage.

XV.

This defendant is informed and believes that the question whether the publication of complainants designated "Tip Top Weekly"
38 is a periodical publication within the meaning of the law and so entitled to transmission as second class matter, is a mixed question of law and fact to be determined upon a comparison of the said publication itself with the conditions set out in said Act of March 3, 1879, and consideration of all the facts and circumstances surrounding its publication. This defendant is informed and believes that

the decision of the Third Assistant Postmaster General that the issues of the said publication do not constitute periodical publications as required by Sections 7, 10, 12 and 14 of the Act of March 3, 1879, is not an error of law as alleged, but is the correct and true finding upon the law and facts. This defendant denies that said decision of the Third Assistant Postmaster General is simply an arbitrary, capricious and unlawful conclusion, imposing upon the right to transmit matter of the second class unspecified and undefined requirements in excess of and in addition to those established by the statutes of the United States and unauthorized by the statute under which he assumed to act and wholly beyond his power and jurisdiction; and avers on the contrary that said decision is the just and proper conclusion upon the law and facts, reached in a fair, open and judicial manner and with due regard to all the rights and privileges of the complainants, and fully authorized by the statutes of the United States defining mail matter of the second class and regulating its transmission.

This defendant is further informed and so believing avers, that in deciding the question whether the publication of complainants is a periodical publication within the meaning of the law, the
39 Third Assistant Postmaster General considered not only copies of successive numbers of the publication by comparison with the requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry.

This defendant is further advised, and so believing avers, that the Third Assistant Postmaster General, after careful inquiry into the law and facts bearing upon the question whether the said publication of complainants is a periodical publication as defined by the Act of March 3, 1879, and before taking action upon the conclusion which he had reached in respect of said question, to assure himself of the correctness of such conclusion and that it was just and in accordance with law, requested and received the opinion of the Assistant Attorney General for the Post Office Department upon the matter, the same being the opinion to which the complainants refer in their said bill; and further avers that the action of the Third Assistant Postmaster General in excluding "Tip Top Weekly" from the second class of mail matter was not taken arbitrarily or capriciously but upon deliberate and careful consideration of the whole subject.

This defendant is informed and believes that his action in excluding said publication from the privileges of transmission in the mail at the second class postage rate is not contrary to the practice of his predecessors in office, but is in full accord and harmony with the practice established on or about November, 1901 by his predecessor Postmaster General Smith, and uniformly pursued since that time and avers further that a large number of publications similar to "Tip Top Weekly" have been denied the second
40 class mailing privilege since said time, to-wit, November 190 among which were: "Arrow Library," "Medal Library" "Log Cabin Library," "Eagle Series," "Broad Brim Weekly" and other books published by Messrs. Street and Smith; "Beadle's Ha

POOR CO

Dime Library," "Beadle's Boys' Library," and "The Dime Library," published by M. J. Ivers & Company; "Modern Library" published by the Modern Stories Publishing Company; "The Family Library" published by The Family Library Company; "The Arm-Chair Library" and "The Leisure Hour Library" published by F. M. Lupton; all of New York City, to copies of which said publications annexed hereto as Exhibit G this defendant refers and prays that the same be taken as a part hereof.

This defendant is further informed and believes that the admission and transmission of mailable matter under the terms prescribed by the statutes of the United States is a continuous administrative act, the performance of which is devolved by law upon this defendant, and that in performance of this duty this defendant is in no wise bound or controlled by the action of his predecessors in office, nor does the admission and transmission by one Postmaster General of mailable matter of a certain kind as of the second or any other class constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit similar publications under the same name as of the same class and at the same rate of postage.

This defendant is informed and believes that said decision is not a mistake of law, but on the contrary is in full accordance with
41 law and justified and demanded by the *and* facts in respect of which it was pronounced.

XVI.

This defendant is informed and believes that the allegations of paragraph sixteen are true.

XVII.

For answer to paragraph seventeen, this defendant denies that the publication of complainants is a periodical publication, and denies that it complies with the conditions and requirements established by law for the admission of publications to the second class of mail matter; and further denies that the periodicity of issue of said publication is real and that the demand therefor is a periodical demand and can be met only by a periodical issue; and avers on the contrary that essentially the publication is a book and its issuance periodically is designed merely to disguise the true character of each number of the publication, which is that of a separate and independent work and in aid of the original purpose to simulate a periodical publication in order to obtain the benefit of second class rates of postage. This defendant further avers that the contents of each book or number have no relation to the contents of any other number, but are wholly independent thereof and distinct therefrom. This defendant can neither admit nor deny the allegations that if said publication is excluded from the mails it would be impossible for complainants to continue its issuance or to meet by any other form of publication the demand therefor, and submits that the same are wholly irrelevant and immaterial; but for anything this de-

fendant knows to the contrary the same may be true as stated.

42 This defendant denies that the copies of "Tip Top Weekly" circulated by mail are practically all current copies and not back numbers, and denies that the only back numbers so transmitted are a minute fraction of the total issue and not in excess of the usual demand for back numbers of periodicals; and avers on the contrary that a very considerable proportion of copies of said publication circulated by mail are back numbers, and further avers and says that the proportion of back numbers so transmitted is much in excess of that of genuine and real periodicals; and this defendant refers to prominent advertisements of back numbers appearing in each number of "Tip Top Weekly," annexed as Exhibits A, B, C, D, and E, and prayed to be taken as a part hereof, as tending to show that complainants circulate back numbers of said publication very largely by mail.

This defendant denies the allegation of paragraph seventeen that if the second class mailing privilege is taken away from the said publication, complainants will be unable to send the same to various parts of the United States where the only possible means of communication is through the mails of the United States, and that such exclusion from the mails will amount to an absolute prohibition and interdict upon the distribution and circulation of said publication, and avers on the contrary that the only effect of the exclusion of said publication from the second class mailing privilege will be to require the payment of postage upon copies thereof at the third class rate instead of the second class rate.

As to the allegation of paragraph seventeen that "Tip Top Weekly" has a legitimate list of subscribers, this defendant

43 refers to his answer to the same allegation as contained in paragraph five of said bill.

XVIII.

This defendant denies each and every one of the allegations of paragraph eighteen; and avers and says on the contrary that said publication is not "devoted to literature;" that it implies no continuity of literary character and no connection of successive issues one with another, but that each number of such publication is complete within itself and indicates no relation with prior or subsequent numbers; and this defendant further avers that the contents of said publication, while not impure in the sense of being indecent or immoral, are nevertheless unwholesome and positively harmful in their influence upon the class of readers to which it is addressed almost exclusively, to-wit, boys of tender age and immature minds, who receive therefrom false impressions of the duties of life, are filled with the desire of adventure and become restive and discontented under the restrictions and discipline properly imposed upon them by parents or others to whom they should naturally give obedience and look for guidance.

XIX.

This defendant denies that the order of the Third Assistant Postmaster General excluding "Tip Top Weekly" from the second class

POOR COPY

mailing privilege is invalid, and avers on the contrary that said order is fully warranted and valid in law. This defendant is unable to admit or deny the allegation that if said order is put into
44 execution by the postmaster at New York the complainants will not only be compelled to suspend the issuance of their publication but their machinery and appliances necessary to produce the same will become wholly useless and complainants be deprived of their value, which is in excess of the sum of $5,000.00; but submits that said allegation is wholly irrelevant and immaterial. If, however, this court should hold that said allegation is in any wise material to the issues in this cause, this defendant demands strict proof thereof.

XX.

This defendant is informed and so believing avers that the transmission of matter in the mails at the second class postage rates is in pursuance of a mere privilege conferred by statute upon publications meeting the statutory requisites and conditions, and is not a right of property as alleged by the complainants, and that the exclusion of the publication of complainants from the second class mailing privilege for the reason that it does not comply with such requisites and conditions neither deprives the complainants of any property or right of property, nor any right conferred upon them by the statutes or constitution of the United States.

This defendant can neither admit nor deny the allegation that the privilege of transmitting "Tip Top Weekly" in the mails at the second class postage rates exceeds in value to the complainants the sum of $5,000.00 irrespective of the value of the machinery and appliances used in its publication; but submits that said allegation is wholly irrelevant and immaterial to the issues in this cause.
45 If, however, this court should hold said allegation to be in any wise material to said issues, this defendant demands strict proof thereof.

Answering generally to the whole bill, this defendant says that as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and administering all laws relating to the postal service; that among his duties is that of classifying matter offered for transmission in the mails of the United States, and which by law is admissible thereto, and distributing the same into the several and respective classes established by Congress; in the course of which classification it devolves upon him to inquire and ascertain whether matter offered as of the second class complies with the conditions prescribed by law for such class of matter; that such inquiry and determination demand the examination of evidence and the consideration of questions of law and matters of fact; that in pursuance of such an inquiry this defendant found and determined after due notice and a full and fair hearing to the complainants, and on consideration of the law and its application to the facts and evidence relevant and material to the inquiry, that "Tip Top Weekly" published by the complainants, does not have the characteristics prescribed by statute for matter of the second class, but on

the contrary possesses the characteristics of third class matter, and, not fulfilling the conditions established by law for matter of the second class, was not entitled to admission to the mails at the second class postage rate, and that the certificate admitting such
46 publication as matter of the second class should for that reason be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant and of the Third Assistant Postmaster General, acting in that behalf, and for that reason as this defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further submits that the complainants in and by their said bill and the matters and things set forth therein do not make or state such a case as would entitle them to the relief thereby prayed, and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publication is not entitled to transmission at the second class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an Executive Department in a matter involving the exercise of his judgment and discretion; and submits that the publication of complainants is of such character as to work moral harm and injury to those into whose hands issues thereof are destined to fall, and whose minds are open and receptive to such improper influences, and should not have the aid or assistance of a court of equity in continuing the exercise of a special statutory privilege intended to make possible the widest and freest dissemination of information of general interest or instructive or educational value; and this defendant hopes he will have the same benefit of these defences as if he had
47 formally demurred to the said bill upon the ground thereof.

Having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

G. V. L. MEYER,
Postmaster General.

DISTRICT OF COLUMBIA, *ss:*

George V. L. Meyer Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

G. V. L. MEYER,
Postmaster General.

DANIEL W. BAKER,
U. S. Atty.
RICHARD M. WEBSTER,
Special Counsel.

Subscribed and sworn to before me on this second day of November, A. D. 1907.

[SEAL.] GEORGE G. THOMSON,
Notary Public.

My commission expires March 14, 1911.

POOR COP

48 *Joinder of Issue.*

Filed December 3, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading Under the Firm Name of Street & Smith,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States.

Now comes the Complainant- in the above entitled cause and joins issue on the answer of Defendant filed herein.

HENRY H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainant-.

49 *Testimony on Behalf of the Complainants.*

Filed March 31, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading Under the Firm Name of Street and Smith, Complainants,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

WASHINGTON, D. C., SATURDAY, *December* 7, 1907—
10 o'clock a. m.

Met pursuant to notice at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Present: On behalf of the Complainants, J. J. Darlington, Esq., and Henry H. Glassie, Esq.

Present: On behalf of the Defendant, Stuart McNamara, Esq., and R. M. Webster, Esq.

Whereupon ORMOND G. SMITH, was duly sworn as a witness on behalf of the Complainants, and testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. Your full name is Ormond G. Smith? A. Yes, sir.

50 Q. Where do you reside? A. New York City.

Q. Will you state whether or not you are one of the com-

plainants named in the suit of Ormond G. Smith and others, against George von L. Meyer, Postmaster General? A. I am.

Q. Are you a member of the firm of Street and Smith, Publishers of New York City? A. Yes, sir.

Q. Will you state of whom that firm consists? A. Myself, my brother George C. Smith, my sister Cora A. Gould.

Q. What is the firm name under which you trade? A. Street and Smith.

Q. Where is your establishment? A. Fifteenth Street and Seventh Avenue, New York City.

Q. What is the business of the firm of Street and Smith? A. We are general publishers. The business is divided into three parts really, we publish five cent weeklies, that are in question here, and publish monthly magazines, and we publish novels, paper covered novels.

Q. How long has that firm been in existence and in the business of publishing? A. About fifty-five years.

Q. How long have you been connected with it? A. Twenty-four.

Q. Whom did you succeed? A. I succeeded to the interests of Francis S. Street, one of the founders of the firm.

51 Q. Has that firm been in the publishing business continuously for fifty-five years? A. Fifty-five years; yes, sir.

Q. Are you the publishers of the weekly periodical known as "Tip Top Weekly." A. Yes, sir.

Q. How long have you published that weekly? A. I should say about twelve years.

Q. I show you a copy of a publication entitled "Tip Top Weekly," volume one, number one." Will you look at that and state whether or not that is the first issue? A. Yes, sir, this is the first one.

Q. Has that publication been issued continuously from that date to the present time? A. It has.

Q. Will you state, if you know whether or not, from its origination, it has been passing through the mails as second class matter at second class rates of postage? A. It has until this recent order, except for a very short time.

Q. I mean, of course, down to the order involved in this case? A. Yes.

Q. From the beginning, until the order in this case, it passed continuously as second class matter? A. Yes, sir.

Q. Are you familiar, Mr. Smith, with the various issues of this publication as they appear weekly? A. I have read a great many.

Q. I refer not only to the contents, but to the act or fact of

52 publication from week to week. A. Yes, I know all about that.

Q. Will you state whether or not this publication is regularly issued, as frequently as four times a year? A. Yes, sir; every week on a given day.

Q. Does each number bear date of issue? A. Yes, sir.

Q. Are these weekly numbers numbered consecutively? A. They are.

Q. Have they been regularly issued from the time of beginning of this publication down to the order of exclusion? A. Yes, sir.

POOR COP

Q. Regularly each week? A. Yes, sir.
Q. Without intermission? A. Yes, sir.
Q. Are they issued from any known office of publication; if so what? A. Yes, sir. The office of the firm at Fifteenth street and Seventh avenue.
Q. New York? A. New York.
Q. What are the numbers embraced in the building at Seventh avenue? and Fifteenth street? A. Seventy-nine to eighty-nine.
Q. Seventh avenue? A. Seventh avenue.
Q. Will you state whether or not these weekly publications are formed on printed paper sheets? A. Yes; they are.
53 Q. Are they bound in board, cloth or leather? A. No, sir.
Q. Are they bound in any other substantial binding? A. No; very unsubstantial.
Q. Is this publication designed and conducted by you for advertising purposes? A. No, sir.
Q. Has the publication a legitimate list of subscribers? A. Yes, sir.
Q. Are you familiar with the contents of the publication itself? A. Yes, sir.
Q. Are you able to state, from your knowledge of these weekly issues, over a considerable length of time,—let us say since the beginning of the publication itself,—the general nature of its contents? A. Yes, sir.
Q. Now will you state,——

Mr. McNAMARA: You mean fifty-five years ago down from that time?

Mr. GLASSIE: No; from ten years ago.

The WITNESS: I already stated the publication was twelve years old, to the best of my knowledge.
Q. Confining yourself, of course, to this publication, and your own knowledge, state if you know what has been and what is now the general nature of its contents? A. The stories are college stories and stories of athletics, almost exclusively. The stories concern themselves with the doings of one set of characters,—that is, the protagonist of the story goes through the entire series and new
54 characters are added from time to time to freshen up the narrative, but the stories are more or less in sequence of venture of college and athletic sports.
Q. What class of readers is the publication intended to reach? A. It is intended generally for young America.
Q. State if you can, whether or not the authorship of the successive issues of the publication is the same? A. Yes, the authorship is the same in every case, with a possible exception of one or two numbers. In emergencies, we have to publish a number here and there, but very rarely, by another hand.
Q. Can you describe in further detail the relation of the successive numbers to one another in respect to the character dealt with and the general course of incidents, and you might call it the knotting of the series? A. Well, the stories started in a school. The hero came to school to pursue his studies and there he met some boys who became the characters in this story and after they had run their

course through the school, they went to college where their circle of friends widened and the story got a great deal more scope and opportunity for local color. The stories try to be successful to portraying actual life, and conditions in college, and in the summer time when the colleges close, they do what a college boy naturally would do under those circumstances, and engage in base ball contests wherever they happen to be, and in the fall of the year they go into foot ball, and in the winter season play hockey and go in for winter sport, and in that way the different seasons of the year is kept up. The college spirit pervades all these stories and of
55 course the athletic interest is very strong.

Q. Can you state whether or not the games dealt with, in the successive issues, are the games which succeed one another according to the well known succession of sports in the different seasons of the year? A. As a rule, in order to make the stories sequential, the boys establish a league; for instance, where there are a number of teams, they play games with one another and that makes it necessary for them to have a percentage of games lost and won as we read in the daily papers. At the end of the season, of course, one team wins over the others; the object is of course, to keep the boys on the qui vive and to see how the thing will turn out.

Q. One game necessarily involves a return game, I suppose? A. That is it.

Q. Now with respect to the continuity of characters, can you describe that more fully than you have done? A. The main character in the story, of course graduates in the course of time at college, and enters business. He is engaged in two or three occupations and loses his money and has to begin over again and is getting older all the time, and then it becomes necessary to have a new character around whom the story should revolve, and his brother is taken as the chief actor in the stories and that gave him the opportunity to grow up. The stories haven't got any further than that, but I presume his relatives will be worked in as time goes on, if the interest lags.

Q. Is this character you refer to the one known as Frank
56 Merriwell? A. Yes, sir.

Q. Do you publish any other weekly juvenile, except the Tip Top Weekly? A. Yes, sir; we have four others.

Q. Will you name them? A. "Brave and Bold", "Buffalo Bill Weekly", "Nick Carter Weekly" and "Diamond Dick Weekly."

Q. Were these other weeklies excluded by the same order which excluded the Tip Top Weekly? A. Yes, sir.

Q. Will you look at the copies of Tip Top Weekly filed as exhibit- to the bill in this case, "Exhibit- numbers 5, 6, 7, 8, and 9," and state whether in respect of the characteristics about which you have already testified, those copies are or are not similar to the other issues of the publications throughout the series? A. I should say these are good average samples.

Q. Prior to the publication of the Tip Top Weekly, did your firm publish any other weekly story paper of similar character? A. Yes, the New York Weekly.

Q. How long did your firm publish that? A. Fifty-five years.

POOR COP

Q. Have you a copy of that with you? A. Why, I have sent for a copy.

Q. Now Mr. Smith, with respect to the circulation of the Tip Top Weekly, will you state the number of copies regularly circulated of that publication? A. The edition is 105,000 weekly.

Q. I think you stated the publication comes out on a
57 certain day of each week? A. Every Friday.

Q. Will you describe the method by which this 105,000 copies are distributed to the readers? A. Yes, sir. The American News Company acts as distributing agents for us. They take the entire edition and distribute it in turn to their various branches,—they have about fifty branches in the United States, in the principal cities,—and the branch news companies distribute the publication to their customers. Their customers are the news dealers who live in the city where the news company is, known as city dealers; and they have another department for the country, from which they supply the country dealers. The news companies of course keep books in which the names of their customers are recorded and opposite the names of the dealers, they have columns designating the different publications, so that the dealer's order is indicated there by a number, and when these numbers are totaled up, they represent the order of that news company for that given publication. The branch then sends a memorandum of the number to the main office in New York, and in that way the total circulation is made up.

Q. What is it that determines the number of copies that are issued? A. The demand. The news dealer makes his order in accordance with the demand, that is, at his place of business.

Q. By the news dealers, according to the description you have just given, you mean the final man who supplies the customer with the article? A. The retail dealer.

58 Q. What is it that determines the call that is sent in by the retail dealer for any particular number of copies? A. Perhaps I could explain that in my own way, if you do not mind. The trade terms on the publications are three and one half cents per copy and the publication is returnable, if not sold, it is returnable at three cents at the dealer's expense, so he loses half a cent a copy on every copy he fails to sell, if he orders it.

Q. Then if a dealer orders a copy from you, from the news company, in excess of the number he sells, he loses on that copy half a cent? A. Yes. So that would indicate that he is very careful to make his order for the publication to agree with the actual demand as near as possible. The publication is only on sale for a week and if he allows anything for transient trade, he is apt to lose money. Therefore, he orders about what he has a call for from his customers.

Q. By his customers, who do you mean? A. The boys who come into the shop to buy.

Q. Then in summing up what you have said, the news dealer, sending in his order, does so by reason of foreknowledge of the demand that he must supply? A. Yes.

Q. In other words, it is not a fortuitous thing, but he sends in a request for a sufficient number of copies to meet the trade itself? A. The actual demand.

Q. How does he know what the actual demand is? A. I mean he asks a purchaser whether he intends to take the publication
59 regularly and if he says he does, he puts that down for an issue and in that way he makes up what is known as a standing order, gives a standing order to the news company for a certain number of copies which go to a certain number of definite people. Of course it is up to him to order extra copies for the transient demand, for in order to make the circulation accord with the actual demand, we made this prohibition about the half cent rebate on the return copy.

Mr. McNAMARA: We move that the answer be stricken out on the ground that — is founded only on information of the witness. He has no definite knowledge whatever of the course pursued by the news dealer.

Q. Are you familiar, Mr. Smith, with the course of dealing of the American News Company, in dealing with periodicals generally? A. Yes, sir; I had charge of the circulation of our business for a good many years.

Q. Referring now to the explanation that you have given of the method of distributing your publications, I will ask you again whether you are personally familiar with that matter? A. Yes, sir; I have had access to the order books of the news dealers and I have seen their names and the pencil memorandums for all our publications.

Q. How many branches has the American News Company, main branches? A. About fifty now; they are added to from year to year.

Q. They are located where? A. In the principal cities of the United States.

Q. How is the circulation outside of the principal cities,
60 and in the vicinity of them met by the news company? A. They send dealers supplies by mail or express.

Q. Of course you know that the news dealer has the same privilege as the publisher in mailing at second class rates? A. Yes, sir.

Q. Now I find in the answer of the Postmaster General, the following statement, to which I will draw your attention. I read from paragraph 5, page 4: "This defendant is informed and believes and avers that none of the said several books or novels, by which he designates your weeklies published under that designation, are sent through the mails to individuals who subscribed for them for any period of time, but that all, or practically all of the copies of said books or novels so published by the complainants, either directly or through agents are distributed to news agents or news dealers who in turn sell them as books singly and without relation to the other books or novels likewise published under the same designation." Now, I will ask you what is the fact about that? A. Well, they are sold singly in the sense that they are issued weekly and disappear from the news stands in that week but each number bears direct relation to the numbers that have gone before and the numbers that will follow, as the publication itself shows.

Q. In view of the method of distribution which you have described, and the method of returning the unsold copies, can you state

POOR COP

whether or not in fact the issues of this publication are sold in the same manner as books are sold? A. No, sir; I should say that they are more ephemeral, and they are not intended to be sold
61 other than as periodicals, and I do not think any dealer would stock them as he would a book.

Q. Are they in point of fact, sold generally after the expiration of the week during which they are published? A. I should say not.

Q. Now with respect to copies, are you familiar with the custom of periodical publishers in dealing with the American New- Company as to return copies? A. Many publishers use their returns for sample copy purposes when they get them back, but we destroy ours.

Q. Do you issue any sample copies? A. None.

Q. Are there any persons who subscribe directly to your firm for the publication. A. Yes, sir.

Q. Are you able to state the number of those persons? A. I think our subscription list shows twenty-five hundred at the present time.

Q. I understand you to say that you also publish monthly magazines? A. Yes, sir.

Q. And that your firm has been in the business fifty-five years? A. Yes, sir.

Q. Are you sufficiently acquainted with the methods of business of periodical publishers to say what is the average circulation of periodicals generally, to individual persons, who subscribe by writing to the publishers, as compared with the general circulation of publications.

Mr. McNAMARA: I do not think the witness has qualified to testify sufficiently as to the general trade.

62 A. I could testify as to what other publishers have told me in the periodical publisher association, of which I am a member.

Q. It is manifest, of course, that we cannot proceed to call every publisher in the United States to prove what ratio his subscription list to the individual subscription, bears in the way of relation to his entire circulation, and if it is generally known what that percentage is in the publishing business, I will ask the witness to state, if he feels that he has sufficient knowledge of it. A. It is less than ten per cent.

Mr. McNAMARA: I renew my objection to the question and move that the answer be stricken out.

Q. Are you at all acquainted, Mr. Smith, with the testimony on that point produced by the representatives of the entire body of the American Periodical Publishers, before the Postal Commission, created to inquire into the conditions of second class matter? A. Yes, sir; I read the report very carefully.

Q. Are you able to state, from your general knowledge of the publishing business, and the custom of that business, what percentage subscribers copies sent direct by the publishers, bears to the whole circulation of the daily newspaper.

Mr. McNAMARA: We object to that on the ground that if it is

incorporated in this report, the report is the best evidence, and if it is a general question, it is irrelevant and not necessarily dedicated or related to the question involved in this case.

A. Yes, I know it to be about three per cent.

63 Q. Mr. Smith, how large establishment has your firm?

A. The building?

Q. No, I mean the entire establishment; what is it worth? A. In terms of money?

Q. Yes. A. Our last inventory showed eighteen hundred thousand dollars.

Q. Is that exclusive or inclusive of the good will? A. That is exclusive.

Q. Have you any building used for the purpose of your publishing business? A. Yes, sir.

Q. State where it is located, and of what it consists? A. We erected this building at fifteenth street and seventh avenue to meet the requirements of our business.

Q. What is the value of that building? A. Six hundred thousand dollars.

Q. Is it used exclusively for the publishing business? A. Yes, sir.

Q. If you were forced by the ruling of the Post Office Department, excluding your weeklies testified to, from the second class, to discontinue the publication of them, what proportion of that building would become useless to you, if any?

Mr. McNAMARA: I object to this question as irrelevant.

A. About a third.

Q. Is that building you mentioned, the known office of

64 the publication of the Tip Top Weekly? A. Yes, sir.

Q. And of the other weeklies you have referred to? A. Yes, sir.

Q. What presses, if any, are required for the publication of Tip Top Weekly and the other weeklies so excluded? A. We use twelve presses to turn them out, ten flat-bed and two rotaries.

Q. What is the value of those presses? A. Flat-bed presses cost twenty-five hundred dollars a piece and the rotaries cost twelve thousand a piece.

Q. What is the total value of that? A. That would be about forty-nine thousand dollars.

Q. If you were compelled to discontinue the publication of these weeklies, what effect if any, would that have upon the value of those presses?

Mr. McNAMARA: The same objection is renewed to this question.

A. The rotaries, presses, were specifically constructed to print the library, and as the page was of unusual size, the presses would be practically of no value.

Q. What with respect to the flat presses? A. They are standard

POOR COPY

sized presses and might be used in a second hand way. I should not think they would be of much value.

Q. In point of fact, are you able to state whether second hand flat presses have any market in the publishing business? A. Very little.

Mr. McNAMARA: The same objection.

Q. Look at the paper I now hand you and see if you know
65 what it is? A. Yes, this is a copy of the New York Weekly.

Q. It was referred to by you a little while ago? A. Yes, sir.

Q. How long has your firm published this? A. Fifty-five years.

Q. Can you state whether or not it is now passing through the mails as second class matter? A. Yes, sir.

Q. Can you state whether or not it has done so, so far back as you have been connected with the firm? A. Yes, sir.

Q. Goes how far back? A. To 1883.

Q. Can you state from your knowledge of the record of your firm, and your acquaintance with its business, whether or not prior to that time it was passing as second class matter? A. Yes, sir; I know it was.

Q. Does this copy represent substantially all the issues of the New York Weekly, in general character? A. Yes, sir; that is a fair sample of what it includes.

Mr. GLASSIE: I offer in evidence the copy identified by the witness and ask that it be marked complainants' exhibit number one.

Mr. McNAMARA: We object to this proffer on the ground that the decision on matters connected with the character of publications, as to whether certain publications fall within the second class matter of mail or not, is a continuous administrative act and one for the determination of the Postmaster General, and the Postmaster
66 General is not bound by any previous determination. We further object on the ground that the paper offered in evidence has no necessary relation to the papers involved in the present suit as far as its characteristics or its qualities are concerned.

Mr. GLASSIE: Counsel for the complainants desires to state that this offer which they propose to follow up by a number of other offers, is designed primarily to show a contemporaneous construction of the postal statutes under which publications of the character here at issue were admitted as periodicals and as second class matter prior to the act of March 3, 1879, during the period in which the provisions of the act of March 3, 1879, were being debated in Congress and being considered by the post office committees of the two Houses, at the time when the act of March 3, 1879, was passed, and continuously thereafter until the period of the exclusion of the periodicals referred to in this suit. We propose to show that that construction was uniform, general and unbroken, and that it was continued while the Post Office Department was seeking by new legislation at the hands of Congress, the amendment of the law for the express purpose of accomplishing the exclusion of the periodicals which by that unbroken administrative construction,

they had always admitted and were then admitting to be within the provisions of the act of March 3, 1879.

Mr. McNAMARA: Counsel for the defendant further objects on the ground that this evidence is incompetent, in that the course pursued by public officers, or the common contemporaneous construction of a certain act, or the views expressed in debates
67 in Congress and elsewhere in interpretation of the act, at and about the time of its passage, are inadmissible and incompetent to explain or interpret the act in the absence of some ambiguity or uncertainty in the act itself. Furthermore, counsel for defendant objects on the ground that no previous interpretation of the provisions of this act, outside of the Postmaster General, can bind the Post Office Department, and the Post Office Department has at no time been bound by any previous decision with regard to any forthcoming issue of a magazine paper or book entered in the Post Office Department.

Q. Will you look at the paper I now hand you, Mr. Smith, purporting to be a copy of Young's Magazine, and state if you know what it is? A. Yes, sir; I have seen the publication.

Q. It is what it purports to be,—a copy of Young's Magazine? A. Yes, sir.

Q. Will you state whether or not Young's Magazine is classified as second class matter and is now passing through the mails as such? A. Yes, sir.

Q. Do you know whether the copy that I produced marked "August, 1907," is a fair sample of the issue. A. Yes, sir.

Mr. GLASSIE: I offer in evidence the copy in question and ask that it be marked complainant's exhibit number two, the same being a copy of Young's Magazine for the month of August, 1907, bearing
68 on the cover title, "Complete Stories. August, 1907. Fifteen cents. Young's Magazine." Also, the imprint, "Entered at the New York City Post Office as second class mail matter."

Mr. McNAMARA: I object, and if the offer does not prove to be material at the end of the proffer, I will then move to strike it out.

Mr. GLASSIE: Counsel for the complainants offer this exhibit and propose to follow it up by other similar offers, for the purpose of showing that the exclusion of the complainants' periodicals in this case involved, is a purely arbitrary and capricious exclusion, and not the result of any settled or uniform construction of the law, and effects a denial to the complainants of the equal protection of the law.

Q. Now, will you look at this publication I show you, Mr. Smith, and state if you know whether that is a copy of "Short Stories," and whether it is a fair sample of the regular issue of that publication. A. Yes, sir; I recognize the publication. It is a fair sample.

Q. Is it admitted as second class matter? A. Yes, sir.

Mr. GLASSIE: I offer that in evidence and ask that it be marked complainants' exhibit number 3.

Q. Will you look at this and state what it is? A. This a copy of "Trans-Atlantic Tales," and is a fair sample.

Q. Is it passing as second class matter? A. Yes, sir.

POOR COP

Mr. GLASSIE: I offer this in evidence and ask that it be marked complainants' exhibit number four.

69 Mr. MCNAMARA: I offer the same objection.

Q. Will you look at that and state what it is. A. This is a fair sample of the "Gray Goose," and is entered as second class matter.

Mr. GLASSIE: I offer the exhibit of the "Gray Goose" and ask that it be marked complainants' exhibit number five.

Mr. MCNAMARA: The same objection to the "Gray Goose."

Q. Will you look at that. A. "The Black Cat" is also a fair sample copy, and is entered as second class matter.

Mr. GLASSIE: I offer the exhibit of the "Black Cat" and ask that it be marked complainants' exhibit number six.

Mr. MCNAMARA: I offer the same objection to the "Black Cat" exhibit.

Mr. GLASSIE: We will make subsequent offers along the same line.

Q. I will ask you, Mr. Smith, what effect upon the continuing of your juvenile weeklies, Tip Top, and the others mentioned, will the order of exclusion from the second class have, if it is maintained? A. I think it will result in reducing the circulation about one half. There would be a loss of the country business,—the news dealers supplied by the news companies through the mails.

Q. What would be the financial loss to you and your copartners? A. We would lose the use of our building and lose the use of the machinery; we would lose the value of the trade mark of Tip

70 Top Weekly, and we would lose the profits in the undertaking to that extent.

Mr. MCNAMARA: We of course object to these last two questions and move that the answers be stricken out, the question being irrelevant as to whether the publications fall within the second class mail or not.

Q. You say you would lose by the reduction of the circulation, from one hundred thousand to approximately fifty thousand,—one half,—a portion of the profit in the publication of that weekly and the other weeklies. Will you state whether or not you would lose the same proportion of the profit that is represented by the ratio of one half the circulation to the whole circulation, or whether you would lose more?

Mr. MCNAMARA: We offer the same objection.

A. I do not quite get that.

Q. To get at in another way. Is the publication of the Tip Top Weekly a profit to your firm? A. Yes, sir, but it is only profitable by reason of its large circulation.

Mr. MCNAMARA: We offer the same objection.

Q. Now, if the circulation at one hundred thousand gives you a certain profit, if that was cut in half, would your profit be cut in half? A. Very much less,—we might actually get on the wrong side of the ledger.

Q. Then coming back to the question I first put, if it gives you a certain profit at one hundred thousand, would you lose half of that profit if it were cut down, or more than half? A. Very much more.

71 Mr. McNAMARA: The same objection.

Q. Can you state whether or not if the circulation were cut down half and the publication retained its present standard of character, it could be published at a profit? A. I could not state positively, but I think the profit would be very small.

Q. How many copies of Tip Top Weekly do you issue in the course of a year? A. About twelve million copies.

Q. Being something more than one hundred thousand for each week? A. Yes, sir.

Mr. McNAMARA: To all of this testimony on the financial result in the event of the enforcement of this order, counsel for defendant objects on the grounds of irrelevancy as above stated, and on the further grounds that the questions seek to have answers based upon an inference of financial loss, upon a previous inference of loss of circulation.

Q. What is the price of each copy? A. Five cents.

Q. When you received this notice to show cause why these weekly publications should not be excluded from the mails, did you designate anybody to represent you at Washington? A. Yes, sir.

Q. Who was that? A. It was yourself.

Q. I think you are mistaken. The order of exclusion, I mean, which was to be answered. Whom did you designate to come

72 to Washington to represent you? A. Mr. Heines, our general manager.

Q. When you said you designated me to represent you, what did you refer to? A. As counsel. I did not understand the exact period that you referred to.

Q. That is all. A. Might I volunteer a word with regard to the circulation of Tip Top, to make it clear why I thought we would suffer a loss of circulation if the order of exclusion went through? The circulation is about evenly divided between city dealers and the country dealers and the seven hundred per cent increase of postage with the country dealers would naturally oppress them and we would naturally expect to have a big loss of circulation due to that fact. That is all.

Cross-examination.

By Mr. McNAMARA:

Q. Your business is not incorporated, Mr. Smith? A. No, sir; it is a partnership.

Q. Now the price of this Tip Top Weekly is what? A. Five cents a copy.

Q. Is that the price as sold on the stands? A. Yes, sir.

Q. And the price to subscribers? A. Two dollars and a half a year.

Q. How far does this dissemination of this Tip Top Weekly in this country extend? A. Well, it is quite universal. It goes

POOR COPY

through all the news trade channels which extend all through
73 the country, and of course we reach a great many post offices where there are no news dealers.

Q. I understand that the distribution is taken over by the American News Company? A. Except what we mail ourselves.

Q. You stated you had a list of subscribers? A. Yes, sir.

Q. How many did you state you had? A. Twenty-five hundred.

Q. Have you that list with you? A. No, sir; I did not bring the list.

Q. Can you furnish us a copy of the list so we can file it in this case? A. If you desire it we could. I see no objection to it.

Q. I would like you to do that. Now are these direct subscribers? A. Yes, sir.

Q. Are they individuals? A. In most part; some of them may come through the subscription agencies, but the majority come to us direct.

Q. Are they minors? A. In some cases parents subscribe for the children; in others,—I could not say as to the proportion.

Q. You will let your list show that? A. Certainly.

Q. This publication, I understand, has had a life of something like twelve years? A. Yes, sir.

Q. You have been familiar with it through all that time?
74 A. Yes, sir.

Q. And it has not missed any of its weekly appearances? A. None.

Q. You state that the hero or the protagonist, of this publication, is a young man at school? A. He was a young man at school in the first series until he began to grow up.

Q. What estate has he now reached? A. I have an idea that he is a director of an athletic school, or school of culture.

Q. Physical culture? A. I think so.

Q. So he has come through the preparatory school and through college? A. And gone in business.

Q. In the business of teaching athletics? A. Yes; after passing through one or two other businesses?

Q. What is his name? A. Frank Merriwell.

Q. You stated it was necessary to bring in some of the family. Who is the other hero? A. The other hero is his young brother, Dick Merriwell.

Q. Those two are the featured individuals in the stories? A. Yes, sir.

Q. Do the stories deal with anything except the adventures of those young men in athletics? A. I think not. Either one or the other figure in every story and their adventures are those of college life and athletics.

Q. During the college season they are at school and
75 engaged in something pertaining to school athletics? A. Yes, sir; that is it.

Q. I find in number 567 on the back of the exhibit Tip Top Weekly, the story of "Frank Merriwell's Bluff, or, the lost Senorita of Senora". To what particular branch of college life is that story

dedicated? A. I have already stated in the body of the testimony, in the interval of their college activities, they have adventures and travels.

Q. They are adventures and travels of the ordinary college youth in vacation? A. Well, we might not say they are the ordinary adventures—they are the extraordinary adventures, perhaps.

Q. Then in that field, you also place "Dick Merriwell's Skill"; or the "Prince of the Pistol". A. I fancy you will find Dick Merriwell was not the "Prince of the Pistol".

Q. I mean the caption. A. I will say it was probably in the category, although I have not read every number. I could not state positively as to that particular one.

Q. Is the same true of number 587, "Dick Merriwell, lion tamer; or Ate, queen of the air"? A. That comes in the adventure. In other words, I do not think he was a lion tamer by profession, but it happened to be in that particular story.

Q. He undertook this in vacation? A. Yes, sir; it came his way.

Q. As to 576, "Dick Merriwell's Party; or, Spring Times
76 Youthful Fancy". Is that also relating to college life? A. Yes, I should say that was also relating to the sequence of stories running through college and in vacations and intervals.

Q. Is it not true that those stories, are to some considerable extent, devoted to accounts of boy bandits and wild west heros? A. Quite to the contrary.

Q. None of these stories in Tip Top Weekly relate the adventures of Dick Merriwell as a boy bandit or mountain pirate? A. No, sir; nothing of that kind.

Q. I will ask you if the following publications which I shall mention were issued by your company, and are contained in this series:

"Frank Merriwell in Arizona; or, the Mysteries of the Mine."
"Frank Merriwell's Friend; or, Muriel the Moonshiner."
"Frank Merriwell's Double; or, Fighting for life."
"Frank Merriwell Meshed; or, the Last of the Danites."
"Frank Merriwell in Gorilla Land."
"Frank Merriwell's Magic; or, the Pearl of Tangier."
"Frank Merriwell in London; or, The Grip of Doom."
"Frank Merriwell's Venture; or, Driven from Armenia."
"Frank Merriwell in India."
"Frank Merriwell's Vow; or, After Big Game in Ceylon."
"Frank Merriwell in Japan; or, The Sign of Avenger."
"Frank Merriwell's Game; or, Snaring the Sharper."
"Frank Merriwell's Drift; or, With the River Drivers."
"Frank Merriwell on the Road."
"Frank Merriwell's First Part; or, The Start as an Actor."
77 "Frank in Advance; or, The Adventures ahead of the Show."
"Frank Merriwell's Own Company; or, Barnstorming in the Middle West."
"Frank Merriwell's New Venture; or, The Finding of Elsie."

POOR COPY

"Frank Merriwell's Advancement; or, The Engineer of the Mountain Express."

"Frank Merriwell Held up; or, The Robbery of the Mountain Express."

"Frank Merriwell as a Ferret; or, Tracking the Train Wreckers."

"Frank Merriwell's Peril; or, The Smugglers of the Border."

A. I recognize many of those titles, and if they are in the catalogue, I should say they are part of the make-up of the publication list.

78 Q. How many pages are contained in the average issue of this Tip Top Weekly. A. Thirty-two pages in each number.

Q. You advertise that each succeeding issue will contain that number of pages, I believe? A. Yes, sir.

Q. You stated they were chiefly written by the same man. A. Yes, sir.

Q. Who is he, please? A. His name is Gilbert Patten.

Q. Is that his own name? A. That is his name.

Q. Not the name under which the stories are written, his pen name? That name is what? A. Burt L. Standish.

Q. He lives in New York, I suppose? A. No, sir; Maine.

Q. He writes for your firm? A. Yes, sir.

Q. He reels off the stories each week and ships them to you and then you attend to the publication? A. Yes, sir.

Q. Now the similar publications you mention, were "Buffalo Bill," "Nick Carter," and "Diamond Dick Weekly"? A. Yes, sir.

Q. Are they of the same tenor as this Tip Top Weekly? A. I should say they were.

Q. Do you also publish the "Old and Young King Brady"? A. No, sir. All the publications we publish I have designated awhile ago.

79 Q. Now those four latter publications I have mentioned also appear each week? A. Yes, sir.

Q. And they deal with adventure? A. Yes, sir.

Q. When these appear each Friday, do you mean to say they are ready at your house or distributed by the American News Company? A. They are supposed to be on sale on Friday,—that is the day of publication.

Q. Would that apply also in Chicago and St. Louis? A. Yes, sir; copies are sent out in advance, so they may be issued simultaneously everywhere.

Q. You say if they were not sold, they are returned? A. Yes, sir; all subject to return.

Q. You are not paid for them then until after the week is over? A. Yes, sir; they are paid for in advance.

Q. If they are not sold do you rebate? A. If they are not sold we pay back when the copies are returned.

Q. Do I understand you correctly, when they are returned, they are destroyed? A. Yes, sir.

Q. What have you to say as to the back numbers of these weekly issues? A. We have a few back numbers in stock for supplying dealers who wish to get new readers who mostly wish back numbers. They are interested to know what has gone before.

Q. Is it not a fact that in each issue you advertise that purchasers may procure back numbers of publications by applying at
80 your office. A. Yes, sir.

Q. And you sell the back numbers at the same price, do you not? A. Yes, sir; same price.

Q. In each issue there is one story? A. Yes, sir; complete story.

Q. Outside of that story there is nothing else in that issue? A. Oh, there is. There are about two departments, I think in the publication. There is a department for correspondence for readers, and a department of athletics.

Q. Is this the department of correspondence with readers, called "The Top Roll of Honor" on page twenty-seven of this issue, which is in evidence? A. "Applause."

Q. Those purport to be letters from purchasers of your weekly. A. No; answers by the editor.

Q. Those letters and answers are edited under the tip top roll of honor, which is accorded to those which make effort to increase the circulation of the king of weeklies? A. Yes, merely an announcement; they are published under the general title of "Applause."

Q. Doesn't this announcement appear in each issue? A. The announcement does, yes.

Q. Isn't it an announcement to the purchaser or the reader of this issue, that if they endeavor to increase the circulation of the king of weeklies, that their names will appear on this scroll of honor? A. Yes, sir.

81 Q. When you say the circulation is 105,000 weekly, do you mean the circulation of the edition? A. I mean the edition.

Q. You have no way of knowing the demand for these weeklies except from the demand from the news dealers and the people who buy from you, have you? A. We have had frequent reports from our traveling men, *are* circulation men, who go from city to city, who report to us how the circulation is selling.

Q. What is the current number of the Tip Top Weekly, do you know? A. Something over five hundred; I do not know the exact number.

Q. Now, have you the old numbers from one to three hundred and twenty-five? A. No, sir; those numbers are out of print.

A. Have you incorporated those numbers in any other publication which you have on sale for the purchase of Tip Top Weekly? A. Yes, sir.

Q. What is the name of it? A. The stories have been published in book form in the "Medal Library."

Q. They have? A. Some of them have; yes, sir.

Q. Now from, say three hundred and twenty-five down to the current number, have you those in print as book numbers? A. I think we have bound volumes of them, but as to whether there is any stock of the early numbers,—we have a stock of the late
82 numbers. The stories of the earlier numbers being issued in the book form, of course we have no use for stock.

POOR COPY

Redirect examination.

By Mr. GLASSIE:

Q. Now, Mr. Smith, what attention, if any, is paid to keeping up the moral tone of these publications? A. Why, we are very particular to see that vice is punished and virtue rewarded in all these stories, and the author is instructed not to admit any word or phrase in the story that could possibly give offense to anybody, and we try in every way to keep them pure and moral in tone.

Q. What is the attitude of the stories contained in the weekly "Tip Top," with respect to the liquor habit or the tobacco habit? A. The hero of these stories, Frank Merriwell, is supposed to be the embodiment of everything that is of course desirable; the youth who never smokes and does not drink,—and the pages of these publications are full of preachings against those habits. We receive a great many letters of thanks from parents and guardians relating to that subject.

Q. Have you any of those letter- in the files of your establishment? A. Yes, sir; we have a great many.

Q. Could you produce them if requested? A. We have thousands of them, I should say we could produce.

Q. In what respect, if any, do the stories in the Tip Top Weekly, differ from the stories in other juvenile weeklies, such as the
83 "Youths' Companion," for example? A. Well, the Tip Top is addressed more particularly to young America, whereas the other, the "Youths' Companion," and other publications of that class, are rather more for adults.

Q. Are you acquainted generally with the juvenile literature of America? A. Yes, sir; I read quite a good deal of it.

Q. Are you acquainted with the works of Oliver Optic and other writers of that character? A. Yes, sir; we publish all those books.

Q. Oliver Optic is not the real name of the author? A. No, sir; his real name is William T. Adams.

Q. In point of fact, nearly all juvenile literature is generally written under a pen name, is it not? A. Yes, sir.

Q. With respect to incident, character and treatment and moral tone, can you state whether or not the stories in the Tip Top Weekly differ generally from other juvenile literature circulated generally throughout the United States, of a high class? A. I think they are rather more moral, if there is any distinction to be made.

Q. Now, with respect to the circulation of these 105,000 copies published each week, what, in point of fact is the number usually and regularly taken up by the customers? A. The 105,000 is sold with the exception of about twelve per cent, representing the returns.

Q. Twelve per cent representing the returns? A. The returns will average about twelve per cent.

Q. As a publisher of magazines and other periodicals, and as a member of the periodical association, generally, are you able
84 to state what is the average return of unsold periodicals in this country? A. Yes, sir.

Q. What is it? A. The average is about twenty-five per cent.

Q. What in respect of stability of circulation, does the Tip Top Weekly, which has only a return of twelve per cent, indicate? A. It indicates the dealers are very careful not to order more than they have actual demand for.

Q. Do you take any means of assuring yourself that the dealer shall not do that very thing? A. By reason of the difference in trade price, we try to limit the returns.

Q. What do you mean by the difference in trade price? A. We credit the dealer half a cent less on his returns than what he pays for the publication.

Q. So that he loses half a cent on every copy he returns? A. Yes, sir; beside paying the carriage back.

Q. What effect, if any, does that have on the dealer's desire to order more copies than he has hope for in the transient sale?

Mr. McNAMARA: I object to that question as calling for an inference.

A. The dealer naturally limits his orders to the actual bare demand.

Q. What are the average sales of back numbers of Tip Top Weekly? A. Back number sales are trifling. We carry on that business of back number sales principally for the benefit of new readers.

85 Q. What does the new reader want a back number for? A. He observes at once that the story bears a relation to something that has gone before and he wants to read about the earlier adventures of those characters?

Q. Are you able to state in figures, the average sales of back numbers? A. I could not say positively as to that, but I know the business is a very small business. The returns are all cut up as they come back and we do not have occasion to utilize any of the returns for use in back number sales.

Q. These back number sales that you speak of are back number sales by your firm itself? A. Yes, sir.

Q. Is there any back number sale by the dealer? A. I should say not. If the dealer happens to have one or two on his hands, rather than pay the return charges and lose half a cent, he must carry them for a week or two, but that is an unusual proceeding on his part.

Q. What can you say with respect for the demand for your publication after the expiration of the week of issue? A. I should say it was very small.

Q. Are you acquainted with the custom of the trade with respect to monthly magazines, for instance? A. Yes, sir; we publish four monthly magazines.

Q. Is there any demand for back numbers of the magazines? A. Apparently, a small demand.

Q. Are there in fact, sales of back numbers by publishers of magazines? A. If the magazine is running a serial story, sometimes a few back numbers are sold on the strength of the story.

POOR COPY

86 Q. Then the demand for back numbers of magazines and other periodicals is largely dependent, accordingly to the usages of trade, upon the serial and continued character of the story and matters in them? A. Yes, sir.

Q. Will you state in what manner the stories printed originally in the Tip Top Weekly are collected in volume form? A. Well, the stories are written in sequence and it is our custom after a year or two, to take two or three early numbers, and issue them in book form. There is very little alteration or editing done; the stories run naturally from one story to another; it is like a continuous narrative.

Q. In what form, with respect to size of paper etc. are these reprints made? A. They are issued in 12 mo. volumes, books; they average about three hundred and twenty pages.

Q. How does that compare in size with the Tip Top Weekly? A. That is in entirely different form. Tip Top Weekly is duodecimo size, and the novels are in 12 mo.

Q. Those reprints are confined, as the term implies, to stories which have been heretofore issued in the weekly? A. Yes, sir.

Q. You say this is duodecimo size? A. Yes, sir; that is what we call it.

87 Q. What is the difference in size with respect to length and width of the reprint and the issues of the original series? A. Why the page size of the book contains about twelve hundred words and the page size of the library contains a great many more,—I have not counted them.

Q. Could you describe it in inches? A. The page size of the book is three and one half by six.

Q. By the page size, you mean the entire circumference? A. Yes, sir. The page size of the library is very much larger,—I have not measured it. Seven by ten, I think.

Recross-examination.

By Mr. McNAMARA:

Q. Did you say that the weekly is the duodecimo size and the stories in the reprints are in the 12 mo. size? A. Yes, sir.

Q. You have gotten a couple of these stories together in the 12 mo.? A. There are three or more.

Q. How do you make your three hundred and some pages out of those stories? A. Because, I have stated the page size of the library is much larger. There are a great many more words. I am of the impression that the library contains twenty-six thousand words and three times that would be over sixty thousand words, and that is enough to make a book. We lead the story out if the story does not make the required length, we lead it out.

88 Q. That is with regard to the paper, sheets and details of that kind? A. Yes, sir; it seems much larger, but it is not actually larger.

Q. But it does contain stories that have appeared in back numbers of weeklies? A. Yes, sir.

Q. You say there is no difference, so far as you know, between

the moral tone of Tip Top Weekly and other publications as the Youths' Companion and the Oliver Optic series? A. There is no difference, I said, except that I thought our's were more moral in tone.

Q. Is it not true, in the stories of Frank Merriwell, and Dick Merriwell's adventures, there is no effort to impress the idea of parental control, or of obedience to superiors, but on the other hand, to sort of glorify in these heroes, certain daring and risk, and making them really perform when they are mere boys, feats of men? A. No; I think they are quite the reverse. Frank Merriwell is sort of a model in these stories and exemplifies all these virtues, and he is continually constraining the other boys of different types of characters, from doing what they wish to do which would lead them in the wrong direction. Frank Merriwell's feats have always been the portrayal of some character who had the tendency to correction.

Q. Isn't he portrayed as the boy having the strength of a giant, and the boy with wit enough to circumvent an example like a sharper and other feats that are heroic? A. They may be described as heroic; they appeal to the imagination of the boy, but they are such adventures as are found in other books devoted to useful literature.

Q. Doesn't Dick Merriwell or his brother tame a lion and
89 recover a lost senorita? Doesn't he take a trip to Ceylon, Japan and Mexico; doesn't he suppress an insurrection in Mechanics' Hall and become a prince of the pistol and other things of that kind? A. He is quite an extraordinary character. Those stories you called my attention to sometime ago, seem to indicate that his activities were outside of the sphere of college life, and were stories written around him while he was engaged in some other profession after his graduation. I think I stated he had engaged in one or two businesses before that, as instructor of physical culture. For instance, he went into the railroad business and started at the bottom, he having lost his money, and gradually worked up to the top and he went into the business of producing plays in the same way.

Q. Is it not true that the effect of these stories, especially upon the character of the purchaser of these books, is such as to excite unrest and a desire for adventure on the part of young boys? A. No; I do not think so at all.

Mr. McNAMARA: That is all.

By Mr. GLASSIE:

Q. Mr. Smith, you have been asked whether or not the tendency of these weeklies is to create a sort of unrest in youths, and the spirit of adventure as well. Will you state, what if any complaints from parents or other evidences, you have received of any such tendency, if it exists? A. Why, we have hundreds of letters from readers who state that they have been married and that now their
children are reading the publications, and that they hope it
90 will be as beneficial and have as much influence over them as it did in their own case. There are many letters from boys in the same tenor expressing their admiration for the weekly.

POOR COPY

Mr. McNAMARA: I move that the answer be stricken out on the ground that it is not responsive, and even if true, it is not material.

By Mr. GLASSIE:

Q. On the other hand, in contradistinction to these letters you have mentioned applauding the publication, what complaint, if any, have you received?

Mr. McNAMARA: I object to the question on the ground that it is incompetent.

A. We have not received any complaints that I know of.

Q. What knowledge have you of any such complaints? A. No complaints have ever been called to my attention.

Q. What knowledge have you of any such supposed tendency? A. I am satisfied that there is no such tendency.

Q. What knowledge have you of any such result as were indicated in the question of counsel? A. I am sure there could not be any such result.

Mr. GLASSIE: We offer the original certificate of entry of the Tip Top Weekly, and ask that it be copied right into the record and marked complainants' exhibit number seven.

(The certificate just offered by counsel for complainants is as follows:)

(3505.)

Certificate of Entry of Publication as Second-class Matter.

91 POST OFFICE AT NEW YORK, N. Y., *Mch* 1, 1897.

(4177.)

I hereby certify that the Tip Top Weekly a Weekly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. W. DAYTON,
Postmaster,
P'r E. S. POST."

Mr. McNAMARA: Counsel for the defendant reserves the right, of objection to the introduction of the original certificate of entry of Tip Top Weekly, in so far as it is sought to — established by that original certificate that the Tip Top Weekly is entitled today to second class rates. We object so far as that is concerned, that it is not revelant.

Mr. DARLINGTON: May I ask if this objection is based in any degree on any claim on the part of the Post Office Department that there has been any change in the character of the publication since the entry?

Mr. McNAMARA: Objection is based on the general ground that the previous decision, if erroneous or otherwise, is no bar to another decision by the Post Office authorities in the course of their continuous administrative judgment. Whether the publication has changed in its character since that time is one that the counsel for defendant do not now feel called upon to say, as it is a matter
92 of fact within the knowledge of the other side.

ORMOND G. SMITH,
By FRANK D. BLACKISTONE, *Examiner.*

Subscribed and sworn to before me this — day of —— 1907.

—— ——.

93 Whereupon WILLIAM HENRY HEINES, was duly sworn as a witness on behalf of the complainants, and testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. What is your full name? A. William Henry Heines.

Q. Where do you reside? A. In New York.

Q. Are you connected with the firm of Street and Smith? A. I am employed by them.

Q. Do you recall the circumstances of the firm of Street and Smith receiving through the Postmaster at New York, a rule to show cause why the Tip Top Weekly, among others, should not be excluded from the second-class mail? A. Yes, sir.

Q. Upon the receipt of this rule to show cause, were you designated by the firm to appear in Washington in response to that rule. A. Yes, sir.

Q. Did you appear? A. Yes, sir.

Q. When did you come to Washington, Mr. Heines? A. On the 9th of June?

Q. On the 9th of June? A. Yes, sir.

Q. What did you do? A. The 9th of June was on Sunday, I arrived in Washington.

94 Q. What did you do the next day with respect to appearing in response to this rule? A. On the 10th, I appeared at the office of the Third Assistant Postmaster General and I saw the clerk, and I informed him.——

Q. Where is the office of the Third Assistant Postmaster General? A. In the Post Office Building; you can see it from this window. I do not know the street; it is opposite Pennsylvania Avenue.

Q. You went to the office of the Third Assistant Postmaster General? A. Yes, sir.

Q. Whom did you see? A. Saw the clerk in the outer offices of the Third Assistant Postmaster General. The doorkeeper was not there that day.

Q. What, if any, representations did you make to him then? A. Handed him a document telling him I represented Street and Smith and the Frank Towsey Publishing Company.

POOR COPY

Q. What was the document? A. Our response to their citation of May 15th.

Q. What, if anything, did you say to the clerk when you handed him this paper? A. I handed him the document and told him I would be in Town and would call tomorrow by appointment at 2 o'clock.

Q. Why by appointment? A. To give him an opportu-
95 nity to read the paper to see if he had anything to ask the next day.

Q. What time was appointed the next day? A. Two o'clock.

Q. Of what day? A. June eleventh.

Q. Did you see the Third Assistant Postmaster General on the 10th day of June? A. No, sir.

Q. Did you see anybody besides the clerk? A. No, sir.

Q. What clerk was it, do you know? A. It was the one in the outer office. You go in one door and turn to the left and there was a gentlemen right in there.

Q. What did he say? A. He just took that: there was no remark made on the tenth.

Q. How many copies did you leave with him, of this printed document? A. I left one for each of the publications of Street and Smith and one for each of the Frank Tousey Company.

Q. What did you do the next day? A. Called the next day at 2 o'clock and was met by a messenger who took my hat and coat and asked me my business and I told him I had an appointment with the Third Assistant Postmaster General and I waited a few minutes and he ushered me in the side room and I met the gentleman I saw the day previous.

Q. Was it the clerk? A. Yes, sir.

96 Q. Do you know what relation he bears to the Third Assistant Postmaster General? A. Nothing, except that the messenger told me this gentleman would attend to me. I take it he was clerk to the Third Assistant Postmaster General.

Q. What did he say? A. He said, "The party you want to see is down stairs" and the messenger told me to come this way and we went down stairs and I left my coat and umbrella there.

Q. Had you seen the Third Assistant Postmaster General? A. No, sir.

Q. Did you request to? A. I requested to see the Third Assistant Postmaster General.

Q. What answer did you get? A. No answer; except, "the gentleman you want to see is down stairs."

Q. What then? A. I was taken down two floors, probably below, and on the door was "Superintendent, Classification Department" and I was introduced to Mr. Bacon, I presume Mr. Bacon.

Q. Why did you presume it was Mr. Bacon? A. From the name on the door; I never met him before.

Q. What was on the door? A. I remember it was "The Superintendent of Classification."

Q. Do you know who the superintendent of classification is, of the Post Office Department? A. No, sir; I have been informed it was a Mr. Bacon.

Mr. GLASSIE: *Q.* You admit the gentleman, Mr. Bacon,
97 is the superintendent of classification?
Mr. MCNAMARA: Yes.

Q. What occurred between you and Mr. Bacon? A. We looked at one another and I asked him if he had anything to say to me and he said no.

Q. Did you tell him who you were? A. I asked him if he received my card, and I asked him if he received the document I left the day before and he said he had it.

Q. Did you tell him your business? A. I told him I was down there to answer any questions they might ask me.

Q. What did Mr. Bacon say? A. Says "I haven't anything to ask." I asked him if he had read it and he said "Yes." I said "Have you anything to ask me," and he said "No." I said "I have been sent down to see you" and he says,—and I asked him if it was not customary for him to go over that and he says "Well, when they hand me a document like that, they tell me what to say, but I haven't been informed this time what to say, and I haven't anything to say to you."

Q. What further conversation, if any, took place between you and Mr. Bacon? A. I told him I would go back again to the Third Assistant Postmaster General, and I went back and I asked the same gentleman, the clerk, if I could see the Third Assistant Postmaster General and told him I was down for that purpose and he said, he was engaged. I told him I would wait and he says, "It may take a long time" and I said "I will wait, or wait at the hotel."
98 was put into my coat again and I went down stairs to see Mr. Bacon. I returned to Mr. Bacon and told him I had been up stairs and was unable to see the Third Assistant Postmaster General and requested *to* him to put me on record as having called and he said he would do so.

Q. What message, if any, did you leave with the clerk of the Third Assistant Postmaster General with respect to your being subject to his call? A. I told him I was in Washington at the New Willard Hotel and would await any telephone message he would send, and would call at any time.

Q. During these interviews in the office of the Third Assistant Postmaster General, and the office of the superintendent of classification, was any statement made to you of any charge or accusation against the Tip Top Weekly? A. No, sir.

Q. What, if any statement was made at either of those places by any official with respect to grounds upon which the exclusion of the periodical might be urged? A. The question was not taken up at all.

Mr. MCNAMARA: I object to that on the ground that the notice of the citation states those facts, and I object on the ground that it is immaterial as the grounds are specified in the citation.

Q. I show you a copy, which has to be taken as the original, of the rule to show cause, May 17th, drawing your attention to this statement, "Upon the following grounds: That the issues of the Tip To

POOR CO

Weekly do not constitute a newspaper or other periodical
99 publication as required by sections seven, ten, twelve and fourteen of the act of Congress of March 3, 1879, Chapter 180, first *supra* page 246, governing mailable matter of the second class, but are in fact books which, under section seventeen of said act, are third class matter and chargeable, when sent in the mails, at the rate fixed by law for that class of mail matter." Now, Mr. Heines, with the exception of the ground stated in these words in the rule to show cause itself, what, if any, specifications or grounds or reasons or matters of evidence were brought to your attention at the time of this supposed hearing, by any official of the Post Office Department? A. None.

Mr. McNAMARA: I object to the question on the same ground.

Q. Did you at the time mentioned or at any subsequent time, see the Third Assistant Post Master General? A. No, sir.

Q. What, if anything, other than that which you have already testified to, was said to you by the superintendent of classification with respect to the reasons, grounds, or evidence upon which the Post Office Department would rely, to show that the Tip Top Weekly was not a newspaper or other periodical as required by sections seven, ten, twelve and fourteen of the act of Congress of March 3, 1879.

Mr. McNAMARA: I object to the question as calling for the witness's view, as to the ground on which the Post Office authorities would rely for their own decision for the exclusion of this matter as second class mail.

A. The subject was not taken up at all; nothing was said about it.

100 Mr. McNAMARA: I want to add to my objection, the further ground that the question implies the necessity of some statement on the part of the individual whom Mr. Heines saw, as a justification on the part of the Post Office authorities for the issuance of this order excluding the Tip Top Weekly from the second class mail. The record does not show that Mr. Heines submitted a printed brief in response to the citation.

Q. What response, or message, did you receive from the Third Assistant Postmaster General, or any person in the Post Office Department, in reply to your message left with the clerk that you would respond to any message? A. "All right," or something to that effect.

Q. That was when? A. When I was making my last departure; I had been there twice.

Q. After that, what message did you receive in response to that? A. Did not receive any.

Q. What reasons, grounds, or matter of evidence was stated to you by the Third Assistant Postmaster General, or the superintendent of classification, or any officer of the Post Office Department, in support of the allegation contained in the rule to show cause as follows: "But are in fact, books, which, under section seventeen of said act, are third class matter and chargeable when sent in the mails, at the rates fixed by law for that class of mail matter." A. None.

Mr. McNAMARA: We object to the question on the ground that it is immaterial.

101 Q. What matter of fact, of any sort or description, would you say was brought to your attention at either of those interviews? A. None.

Mr. McNAMARA: I offer the same objection.

Q. When did you return to New York, Mr. Heines? A. That night; June 11th.

Q. What train did you take? A. Late afternoon train. I do not recall the hour now.

Q. What communication, if any, did your firm receive from the Post Office Department until the notification of the exclusion which is in issue in this case? A. There was not any communication.

Mr. McNAMARA: I object to that, as that can in no wise bind the defendant.

Q. I show you a paper purporting to be signed by Mr. E. M. Morgan, Acting Postmaster, per E. S. Post, Acting Assistant Postmaster, New York, addressed to Street and Smith, and ask you to state whether or not you know what it is, and whether it was received by Street and Smith? A. Yes, sir.

Q. I show you another paper, purporting to be a copy of a communication to the Postmaster at New York, signed A. L. Lawshe, Third Assistant Postmaster General, and ask whether that is a copy of the letter from the Third Assistant Postmaster General, which is referred to in the letter you have just identified, dated July 27, 1907? A. Yes, sir; it was inclosed with that communication.

102 Mr. GLASSIE: We offer these in evidence and request that they be copied into the body of the record and marked complainant's exhibit- number 8 and number 9.

"Indexed.

Office of the Postmaster,
United States Post Office,

NEW YORK, N. Y., *July* 29, 1907.

2 Encs.
Messrs. Street & Smith, 79 Seventh Avenue, New York, N. Y.

GENTLEMEN: I hand you herewith a copy of a letter from the Third Assistant Postmaster General revoking the authorization for mailing the "New Nick Carter Weekly," "Buffalo Bill Stories," "Tip Top Weekley," and "Diamond Dick, Jr., Boys Best Weekly" at the second class rates of postage, also the copy of the opinion of the Assistant Attorney General for the Post Office Department referred to in the letter of the Third Assistant Postmaster General.

Any copies of these publications hereafter mailed will be subject to the postage rate for third class matter—one cent for each two ounces or fraction thereof—which must be prepaid by stamps affixed

on each separately addressed copy or package of unaddressed ies.

You are also informed that no notice of entry as second class matter should appear in copies hereafter issued or mailed.

Very respectfully,

E. M. MORGAN,
Acting Postmaster.
Per E. S. POST,
Acting Assistant Postmaster."

Messrs. Street & Smith.
M-f.

C. D.
111462. 113162.
113161. 113163. (Copy.) O. N. 31271.

Post Office Department,
Third Assistant Postmaster General,
Division of Classification.

WASHINGTON, *July* 26, 1907.

stmaster, New York, N. Y.

SIR: In connection with the rules to show cause, you are informed at a hearing was given to the publishers of the "New Nick Carter eekly," "Buffalo Bill Stories," the "Tip Top Weekly" and "Diaond Dick, Jr.," at this Office on June 11, 1907.

The arguments of counsel for the publishers were considered and submitted to the Assistant Attorney General for the Post Office Department, who held that the publications in question were not "periodical publications" within the meaning of the w, but "books," and therefore not entitled to transmission at the cond class rates of postage.

In this opinion I concur and accordingly decide that the issues of he "Nick Carter Weekly," "Buffalo Bill Stories," the "Tip Top eekly" and "Diamond Dick, Jr.," do not constitute newspapers or her periodical publications as required by sections 7, 10, 12 and of the Act of Congress of March 3, 1879 (ch. 180, 1 Supp., R. S., age 246), governing "mailable matter of second class," but are in act books, which, under section 17 of said Act, are third class matter nd chargeable when sent in the mails at the rate fixed by law for that lass of mail matter.

Therefore, the authority granted for acceptance of the "New Nick arter Weekly," "Buffalo Bill Stories," the "Tip Top Weekly" and Diamond Dick, Jr.," for mailing at the second class rate of postage s hereby revoked and you are directed to enter that fact upon the ecords of your post office.

You will require postage at the third class rate—one cent for each wo ounces or fraction thereof—to be paid by stamps affixed upon ach separately addressed copy or package of unaddressed copies of he publication hereafter mailed at your office.

A copy of the opinion of the Assistant Attorney General for the

Post Office Department referred to is herewith enclosed to be handed to the publishers for their information.

Respectfully,

(Signed) A. L. LAWSHE,
Third Assistant Postmaster."

M-f.

105 Mr. GLASSIE: It is understood between counsel that the printed document referred to by the witness Heines, is the one on file with the papers, and produced by the defendant as an exhibit to his answer, and we offer it in evidence as the printed document referred to by the witness, and ask that it be marked complainants' exhibit No. 10.

Q. Now, Mr. Heines, will you be good enough to state whether or not, you representing the complainants, or any other person connected with that firm, had any hearing before the Assistant Attorney General of the Post Office Department? A. No, sir.

Mr. MCNAMARA: I object to that as immaterial.

Q. Drawing your attention to the statement at the conclusion of the letter of the Third Assistant Postmaster General to this effect: "A copy of the opinion of the Assistant Attorney General for the Post Office Department referred to is herewith enclosed to be handed to the publishers for their information." I will ask you whether any copy of that opinion, or any opinion of the Attorney General was transmitted to you prior to the letter revoking the authority for the mailing of "Tip Top Weekly"? A. No, sir.

Mr. MCNAMARA: Objected to by counsel for the defendant on the ground that it is immaterial.

Cross-examination.

By Mr. MCNAMARA:

Q. Mr. Heines, what week day, if you recall, did you return to New York? A. The same day I called; I would not recall.—I think it was Tuesday.

106 Q. Did you make one or two visits to the Post Office Department? A. Two visits; on the tenth and eleventh.

Q. The tenth was Monday? A. Yes; I believe it was.

Q. On the tenth, did you have with you that printed brief? A. Yes, sir; I submitted those briefs.

Q. You submitted that on the first visit? A. Yes, sir.

Q. To whom? A. The clerk, as I call him, of the Third Assistant Postmaster General.

Q. Did you know his name? A. Yes, sir.

Q. Did he occupy a room near the office of the Third Assistant Postmaster General? A. Ante-room. As I went in, there was a messengers' room and a small room to the left.

Q. Now, at that time, did you have anything to say — him? A. Simply that I would call the next day at the appointed hour, 2 o'clock.

Q. That was the hour specified, and the day specified in the cita-
n? A. June 11th.
Q. Next day? A. Yes, sir.
Q. So you submitted your brief and was ahead of time? A. Yes,
.

Q. On the next day you called? A. Yes, sir.
7 Q. Whom did you see? A. Saw the messenger this time, the colored messenger, and he passed me along then to some entleman I had seen the day previous.
Q. What did he say to you? A. Said, the party you want to see down stairs, and called a messenger and told him to take me down.
Q. Did he mention any name? A. I am not positive.
Q. Now then, you were taken down to see some official; who was ?
A. Presumably Mr. Bacon, superintendent of classification.
Q. Did you see that name, the title on the door? A. On the glass oor.
Q. And you met him? A. Yes, sir.
Q. Did you have a copy of your brief with you? A. No.
Q. Did he have it? A. No.
Q. Did you make any statement, or argument before him? A. told him I was sent down there from upstairs, the Office of the Third Assistant Postmaster General and I asked him if he received ny brief and if it had been turned over to him and he said, "Yes." e had, and I asked him if he had any questions to ask and he simply aid "No."
Q. Did he tell you you could not make any argument? A. Did not have anything to say on the subject at all.
Q. He did not tell you you could not make a statement? A. No, sir.
108 Q. What was to prevent you from making any statement? A. I was there to answer questions.
Q. You said you were there to answer questions? A. The citation.
Q. What did you find in that to make you state that you were to answer questions? A. We were to receive a hearing on June 11th.
Q. Did you attempt to say anything which you did not have in your printed brief? A. No, sir.
Q. You prepared it? A. With assistance.
Q. And you embodied in that, what you deemed to be your answer to the citation to appear? A. In answer to the citation.
Q. It was your answer to the citation? A. Yes, sir.
Q. On the date of your second visit to Mr. Bacon, was there any clerk around? A. There was a woman there?
Q. She was a stenographer, was she not? A. I imagine so.
Q. You did not then, or after that time, assign other grounds than those which you had put in the printed brief? A. No, sir.
Q. Now I believe after that, you left and went to the hotel? A. Left and went to the office of the Third Assistant Postmaster General.
109 Q. And you found he was still engaged? A. Found he was still engaged.
Q. You left a message with his clerk? A. Yes, sir.

Q. You had previously left your car with Mr. Bacon? A. Yes, sir.

Q. He had noted your appearance? A. Not at that time, he did not. I made the second call back to Mr. Bacon,—when I went up stairs and found that I could not get an interview, I came back and then asked him to put me on record as having called.

Q. When you sent word into the Third Assistant Postmaster General, did you send word that you desired to see him personally? A. I told the clerk that, yes. I said I would like to meet the gentleman.

Q. Did you tell him you wanted to make an argument? A. No, sir. Told him I was there in reply to the citation.

Q. You had previously made the same statement when you called the same day. A. I mean on the eleventh.

Q. Yes. A. Yes.

Q. Then you were taken down to the superintendent of classification? A. Yes, sir.

Q. As I understand, after the time of submitting your brief and your visit, you did not send any further argument to the Post
110 Office Department? A. No, sir.

Q. (Continuing:) In the matter? A. No, sir.

Q. You also appeared in behalf of the Frank Tousey Publishing Company? A. Yes.

Q. Do you recall, Mr. Heines your first visit when you submitted the printed brief? A. Yes.

Q. Did you say at that time that you had some other booklets that you wished to submit? A. Not to the clerk,—to Mr. Bacon.

Q. What did you say? A. I asked him to incorporate that in that brief.

Q. And you said you would submit it? A. Yes, sir.

Q. Did you call to submit that? A. I called on the eleventh, on that second visit I made to Mr. Bacon on the same day I submitted that.

Q. What was the title of that paper? A. It was a pamphlet containing letters commendatory of the "Tip Top Weekly," printed letters.

Q. Now those two publications, your brief, and this pamphlet, were all that you submitted in answer to the citation? A. Yes, sir.

Mr. McNAMARA: That is all.

WILLIAM H. HEINES.
By FRANK D. BLACKISTONE, *Examiner.*

Subscribed and sworn to before me this — day of —— 1907.

111 Whereupon ORVILLE J. VICTOR was duly duly sworn as a witness on behalf of the complainants, and testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. Mr. Victor, will you state your full name? A. Orville J. Victor.

POOR COPY

Q. And your residence? A. My business residence is New York City, but I live out on a country place in New Jersey.

Q. What experience, if any, have you had in the publishing business? A. As a publisher, I was a member of the old publishing firm of Adams, Victor & Company.

Q. When did that firm exist? A. From 1872 to 1876 or '77.

Q. As editor, or author, what experience have you had in connection with the periodical literature of America? A. Well, I have had a pretty wide experience, I should say. I commenced my service in New York City. I came from Ohio in 1857; I was there editor of a paper, "The Sandusky Daily Register." In 1857 I came to New York City, to edit the "Cosmopolitan Art Journal." I assumed the editorship very soon afterward of the "United States Journal." I assumed the editorship of the "Beadle Dime Novel" in 1859 and conducted them up to the dissolution of the firm by the death of the last member, over twenty years. I have written a large number of books. Do you wish the names of the books?

Q. Yes, sir; you might state the names of them. A. Is
112 that material?

Q. Not specially, but you can pass it if it would be tedious.

Mr. McNAMARA: Just state the character of the books.

The WITNESS: I wrote a history of the Southern Rebellion, four volumes, octavo in size, a volume devoted to each year of the War. I wrote an octavo volume called "The History of American Conspiracies." I wrote a life of Abraham Lincoln for the campaign of 1864. I wrote the biographies of Winfield Scott, Israel Putnam, John Paul Jones, Ethan Allen. I wrote a number of brief biographies to be published in the "Men of the Time" series, which was then a serial publication then running in the mails. I contributed largely to the political literature of almost every campaign from 1864 to the present time. That has been my life work.

Q. Now, Mr. Victor, I understood you to say that from 1859 you were editor of the "Beadle Dime Novel Library" for some twenty years; is that correct? A. Yes, sir.

Q. Will you state whether or not, during those years, during the sixties, prior to the Act of March 3, 1879, the "Beadle Dime Novel Library" was passing through the mails as second class matter? A. It was.

Mr. McNAMARA: I object to that on the ground that is immaterial.

Q. Will you state whether or not the publications just referred to were passing through the mails during that time as periodi-
113 cals at periodical rates? A. They were.

Q. Will you state how long those publications continued to pass as periodicals and at periodical rates? A. I do not think they ever were ruled out permanently; they were temporarily.

Q. Now will you state the circumstances of any such temporary ruling?

Mr. McNAMARA: In order to save an objection to each question, it will be understood that my objection applies to this line of testimony.

A. I passed the winter of 1863 and '64 in England. I returned in the Spring of 1864 and was informed that the "Beadle Dime

Novel" had been ruled from the mails as not periodicals. I proceeded to Washington at once; we discussed the case fully and entirely with the Attorney General's Office,—who the Attorney General was my memory forgets his name, but he was the Attorney General representing the Post Office Department. I went back to New York City with an order to restore those Dime Novels to the mails and they were restored and were not thereafter excluded from the mails.

Q. Will you describe the publication you have referred to? A. I think I was the author of the idea of Beadle Dime Novels. I conceived that a good novel could have a very large popular circulation. We started with the initial idea of making every book a good book, unobjectionable. I was given the sole right of choice both of matter and of authors. I selected so far as possible, both old and new authors of a certain class and character, all persons of fine reputation. Each one of those had his own individual name attached to every book that he or she wrote. There was nothing in the
114 whole series for years but what the most sensitive parent could not welcome particularly, but nothing to which any objection could be raised for their being read by their daughters and their sons.

Q. Now I refer especially to the form and appearance of these books. A. They were little 12 mo. books of forty-eight to sixty-four pages, bound with a paper cover and stitched.

Q. Were they published complete in themselves? A. Each number was a complete novel in itself, with no advertisement, no extraneous matter of any kind whatever.

Q. Did each number bear the name of the author? A. Yes, sir.

Q. Do you know whether these publications were issued serially? A. They were.

Q. At stated intervals? A. Monthly. The first series, and then semi-monthly, the demand becoming so great we had to issue them twice as rapidly as we first contemplated.

Q. Were they numbered consecutively? A. They were.

Q. Were they accepted by the Post Office Department as periodicals? A. They were.

Q. Do you know of any other series other than the Beetle Dime Novel series which were so accepted? A. The success of the Beetle Dime Novel was so extraordinary that it called into the field a number of competitors. I do not know definitely, not sufficiently
115 to state as a fact, but I presume they were all treated as the Beadle Dime Novels were treated in the mails, having the same characteristics of periodicals.

Q. State whether the publications you have testified to were regarded as periodicals by the publishing trade and by the purveyors of periodicals?

Mr. McNAMARA: We offer the further objection on the ground that it is immaterial what the purveyor of periodicals or the publishers may have deemed their issues to be.

A. I do not see any question has been raised by which I could obtain any sufficient knowledge of what others did or thought.

Q. Can you as a matter of the history of American literature and of the publishing business in this country, say whether or not during

POOR COPY

the years 1877, '78, and '79, the publications similar to these you have described, were circulating through the mails as second class matter? A. There were a number of publications. The success of the Dime Literature was such as to call into existence a large number of so-called libraries,—not a large number, but say several; the Lakeside Library of Chicago was started, I think first. That was in the folio form and was received as a periodical in the mails. That form with the word "Library" attached, was held up by the Post Office Department and a test case made. They succeeded in being restored to the mails, having been rejected by the postal authorities. At the end of this test case, whether it was in court or not, I do not remember distinctly, but it was restored to the mails and thereafter the library literature was not restrained.

116 Q. Was that a serial? A. Yes, sir.

Q. Are you able to state, Mr. Victor, from your knowledge of the history of the times, whether the Lakeside Library, to which you referred was the one dealt with by the Attorney General of the United States in his opinion upon the Lakeside Library, as second class matter? A. Let me ask you to repeat the first part of that question.

Q. Are you able to state, Mr. Victor, from your knowledge of the history of times, whether the Lakeside Library, to which you referred, was the one dealt with by the Attorney General of the United States in his opinion upon the Lakeside Library, as second class matter? A. That is my remembrance, sir.

Q. Do you remember, Mr. Victor, the circumstances leading to the enactment of the classification, the revisions of the Act of March 3, 1879? A. Well, yes I presume I was pretty well versed in all the proceedings that led up to the Act of March 3, 1879.

Q. Can you state the circumstances under which the first draft of that Act was made; if it was brought to your attention at that time? A. The law previous to 1879 was exceedingly unsatisfactory to the publishers as a rule,—that is, the laws previous to 1879. No parties were satisfied with the law or its administration; its administration was something of the character and kind which we have had recently in Washington, in which law was made in the Post

117 Office Department, so that no publisher knew where he stood. The law of 1879 was the culmination of a series of meetings of publishers and public authorities running through two years. The publishers appointed several committees to confer with the postal authorities. Large correspondence was had with the members of the House Committee on post offices and post roads. Two bills, I think there were, tentative bills, one gotten up in the House by Mr. Money and one in the Senate by,—I cannot remember his name,—they were both submitted to the publishers of New York City in 1877 and 1878 and those bills were cussed and discussed thoroughly and effectively. Correspondence with the House Committee, with Mr. Money, with Uncle Joe, and several other members of the Committee was very large. Among others, I myself, wrote to Uncle Joe, whom I have known for many years. The purpose of it was to make a law so explicit in its definition that the Post Office Department would be disarmed of its power of censorship; that was

the prime object first of remaking the postal laws. The causes of the laws, a number of them, were gone into by the different elements of the publishing business, and it was with great difficulty that we succeeded in getting the law in such shape that it could be submitted to the full committee. I think there were three tentative bills to be submitted to the full committee of the House and it was finally submitted in the shape in which it is now printed. Those are my recollections.

Q. As to the passage of the Act of March 3, 1879, did your publication, the Beetle Dime Novel and the other similar publications you have mentioned, continue to pass as second class matter? A.

118 The original form, the *twelve* 12 mo. form disappeared; the open folio form was the prevailing form. All of those were called libraries; they were issued seriatim, complying with the law as to stated period, office of publications and dates and so on. That library literature became enormously prevalent after the passage of that Act. The increas- was amazing, even to the publishers. The vast amount of libraries put on the market almost overwhelmed the Department, the bulk was so great. They were all classed as second class literature and passed at second class rates, all of them, for many years. I cannot state the number of years, but for many years. They were in the mails up to the date of the making of the law in the Post Office Department setting aside the United States Statute, when Emory Smith was Postmaster General. After three defeats in Congress to attempt this ejection, and defeats which were overwhelming in their character, the Post Office Department under the direction of Emory Smith, promulgated three rules and regulations which threw them out of the mails. Since then they have had tribulation enough. Up to that time there was no trouble whatever in the passage of that class of literature in the mails at second class rates.

Q. Are you acquainted, Mr. Victor, as a part of the history of the times, with the efforts made in Congress to amend the law by the enactment of a provision excluding books and reprints of books issued serially or otherwise from the second class. A. Four separate bills, if I remember rightly, two previous to the Loud bills, attempting the passage of an act excluding that class of literature from the second class rates and assigning them to book rates.

Mr. GLASSIE: As a part of the history of the legislation,

119 we desire to offer House bill number 5359, fifty-fifth Congress, second session, introduced December 17, 1897, and on January 5, 1898, referred to the House Calendar,—and ordered to be printed,—the Loud bill. We desire to draw your attention, and to have printed in the record part of the exhibit the first section of the bill which is as follows: "A bill to amend the postal laws relating to second class matter. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections three and four of

POOR COPY

this act: Provided, That nothing herein contained shall be so construed as to admit to the second class rate publications purporting to be issued periodically and to subscribers, but which are merely books or reprints of books, whether they be issued complete or in parts, whether they be bound or unbound, whether they be sold by subscription or otherwise, or whether they purport to be premiums or supplements or parts of regular newspapers or periodicals."

You will admit that bill didn't pass, won't you Mr. McNamara?

Mr. McNAMARA: Yes. I won't object to it. This offer is objected to because of the ground stated at the beginning of this testimony by this witness, and for the further grounds of the absolute immateriality of the proposed bill which failed of passage, to influence a present act of Congress.

120 Mr. GLASSIE: We offer it for the purpose of showing that effort was made by the Post Office Department to ammend the existing law in the sense in which the Post Office Department now assumes to construe the existing law, and that the ammendment was rejected by Congress.

Mr. McNAMARA: The offer on this ground is additionally immaterial, because the limit of the authority of the Post Office Department in the construction of the Act of 1879, which it is claimed by counsel for the complainants they attempted to extend by the proposed bill, has been judicially ascertained by the decisions of the court and are not now to be modified in any way by any provision from the Post Office Department to accomplish legislation.

Q. Mr. Victor, do you remember any other efforts to change that law besides the one I have just read? A. I think that, Mr. Glassie, was the second Loud bill, if I remember rightly. It was succeeded by a third Loud bill.—I think there was a previous bill of a similar character called a Loud bill in a previous Congress which covers the same point. Being defeated, it was revived and the law you have just read I think is a second Loud bill which was introduced in its place. After that a third Loud bill covering the same point, justifying the Post Office Department in its wish to throw out the library literature, was introduced.

Mr. GLASSIE: Now, I offer in evidence a bill, H. R. 11224, 55th Congress, 3rd session, which is a part of the same offer, and I desire the insertion into the record of the first section, which is as follows.

"A Bill

To amend the postal laws relating to second class mail matter.

121 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections three and four of this Act: Provided, That nothing herein contained shall be so construed as to admit to the second-class rate publications purporting to be issued periodically

and to subscribers, but which are merely books, or reprints of books, whether they be issued complete or in parts, whether they be bound or unbound, whether they be sold by subscription or otherwise, or whether they purport to be premiums or supplements or parts of regular newspapers or periodicals."

Mr. McNAMARA: I offer the same objection as interposed by counsel for defendant to this offer of testimony.

Mr. GLASSIE: I offer in evidence as a part of the same proffer, House bill 6071, 56th Congress, 1st Session, and desire the first section of the bill to be copied in the record.

"A Bill

To amend the postal laws relating to second-class mail matter.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That mailable matter of the second-class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions
122 named in this Act: Provided, That nothing herein contained shall be construed as to admit to the second-class rate publications purporting to be issued periodically and to subscribers, but which are merely books, or reprints of books, whether they be issued complete or in parts, whether they be bound or unbound, whether they be sold by subscription or otherwise, or whether they purport to be premiums or supplements or parts of regular newspapers or periodicals."

Mr. GLASSIE: You will admit, of course, gentlemen, that none of these bills ever passed.

Mr. McNAMARA: I do not know whether they have passed or not.

Mr. GLASSIE: They never were enacted into law. If they were, you would not be trying this case. Fortunately they were never enacted. Of course this is to save time. We can prove it, but we do not want to call in all the evidence to do that.

Mr. McNAMARA: If we admit it was so, it would not amount to much, but I believe they were not admitted into the law.

Q. Did you ever appear before the House Committee on Post Offices and Post Roads, in opposition to these Loud bills? A. Several times.

Q. Did you make any argument against the enactment of an amendment for the purpose of excluding unbound books published serially? A. Arguments and documents ad infinitum, almost, as to the documents.

123 Q. You had the satisfaction of seeing that the bill was not passed? A. When the hearings were given in the House I usually appeared with the publishers and I guess everytime I made an argument,—but I do not recall definitely.

POOR COP

Cross-examination.

By Mr. McNAMARA:

Q. Mr. Victor, what was the year in which you say you saw the Attorney General for the Post Office Department about the exclusion of such publications from the mail as second class matter? A. The first appearance?

Q. Yes, sir. A. It must have been in April, 1864.

Q. Now you saw the Attorney General later, I believe, in regard to the Lakeside Library? A. I do not think I appeared before the Attorney General in defense of the Lakeside Library; I have not so stated.

Q. Then of course, you do not know what transpired with the Attorney General in consideration of the Lakeside Library? A. I knew that it was in the mails. It may have been I wrote an argument on the matter; I am not sure, but I presume I did.

Q. Is the Beetle Dime Novel now in existence? A. No, sir.

Q. Or the subsequent novel which follows the Beetle? A. No, sir.

Q. Has either of those series a successor today. A. I dis-
124 posed of the stock on the death of the last member of that firm and the plates and copyright were sold: the entire establishment was sold out.

Q. What I meant is, is there now current in the mails, a publication following the prototype of the Beadle Dime Novel. A. I think the nearest approach is the Smith publication.

Q. That is the Tip Top Weekly? A. Yes, sir.

Mr. McNAMARA: I simply want to renew the objection which we made to the testimony of this witness, and to move that the whole be stricken out on the grounds which have been heretofore urged.

Redirect examination.

By Mr. GLASSIE:

Q. When you speak of these publications of the library, novels which had been passing through the mails at the time you first mentioned in your testimony, down to a certain date, during the régime of Emory Smith, do you refer to the amended regulation made by Mr. Smith, known as the regulation of July 17, 1901? A. The first law making the regulation?

Q. Yes. A. Yes, sir; I do.

Q. That is the historical date you fix upon as the period. A. As the end of the library literature; yes, sir.

Mr. McNAMARA: Of course we object to this testimony again as to the matter of regulations. As counsel know, one of those regulations has been declared to be an addition to the Statutes, but the others are intact as to force.

125 Mr. GLASSIE: We offer this testimony as a part of the contemporaneous history of American literature, and the pub-

lishing business and ordinary usage, and the history of the circumstances under which the law was passed.

Recross-examination.

By Mr. McNAMARA:

Q. Are you aware of the decision of the Supreme Court of the United States in the case of Bobbs-Merrill Company, and the Houghton Publishing Company? A. Yes, sir. I heard the argument of Mr. Glassie. With regard to the Houghton Mifflin case, the decision of the court was upon one single point giving the Post Office Department simply the right of classification—in very definite terms to say the least, almost indefinite—as the word periodical itself. Justice Harlan and Chief Justice Fuller dissented entirely from that decision, in toto, so that the court was not unanimous. It merely gave the Post Office Department the decision in the Houghton-Mifflin Company case.

Q. Are you in favor of that decision? A. No, sir.

Q. You do not consider that good law? A. No, sir; I consider that a mistake.

Mr. DARLINGTON: We suggest that the counsel is making the witness his own and is therefore bound by his answer.

ORVILLE J. VICTOR.

By FRANK D. BLACKISTONE, *Examiner.*

Subscribed and sworn to before me this — day of ——, 1907.

——— ———,

Examiner in Chancery.

Whereupon: An adjournment was taken until further notice.

126 It is stipulated by and between counsel for the respective parties hereto that the Examiner may sign the depositions for and in the place and stead of the witnesses Ormond G. Smith, William H. Heines and Orville J. Victor, on behalf of complainants, said depositions to be read in evidence with the same force and effect as if signed by the said witnesses themselves.

127 In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith, Complainants,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

WASHINGTON, D. C., *Tuesday, April* 7, 1908—3 o'clock p. m.

Met pursuant to notice at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Present: On behalf of the complainants, Henry H. Glassie, Esq. On behalf of the defendant, Stuart McNamara, Esq.

POOR CO

Mr. GLASSIE: In response to the request by counsel for the defendant, made at the last session held here in this case, for the production of the list of individual subscribers direct to the publisher of the publication known as the Tip Top Weekly, we produce the lists of such individual subscribers as of the date of the request and ask that they be marked by the Examiner and filed.

Mr. MCNAMARA: With regard to the production of the
128 lists of original subscribers, counsel for the defendant reserves the right to examine the same, and if advised, to recall the witnesses produced on behalf of the complainants for further cross-examination with respect thereto.

Whereupon JAMES O. SPANGLER, a witness of lawful age, produced on behalf of the complainants, was first duly sworn and testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. State your full name and place of residence? A. James O. Spangler, 313 Sixth street N. W., Washington, D. C.—that is my business address.

Q. What is your occupation, Mr. Spangler? A. I am Manager of the Washington News Company.

Q. What is the Washington News Company? A. The Washington News Company is a branch of the American News Company of New York City.

Q. What is the business of the American News Company? A. They are the general distributors of the periodical publishers.

Q. Do you know whether or not the American News Company has branches in a number of the larger cities of the United States? A. Yes, in all of the larger cities of the United States.

Q. As manager of the Washington News Company, the Washington branch, are you familiar with the course of business in distributing periodicals in the United States? A. Yes.

129 Q. Do you distribute the periodicals involved in this proceeding known as the Tip Top Weekly and Work and Win? A. Yes.

Q. Will you please state what is the course of business pursued by you in the Washington News Company with respect to the distribution of the copies of those periodicals? A. We receive our orders from the various news dealers, and we in turn place our orders with the publishers. We forward the same quantity to them regularly each week, unless they instruct otherwise.

Q. How is the order that you place with the publishers made up? A. They are made up by the orders received from the various dealers.

Q. How is the order of the news dealer to you made up? A. It is made up from their customers. Their customers call regularly each week for them, and they in turn send their orders to us.

Q. In what respect, if any, does the distribution of the Tip Top Weekly and Work & Win differ from the distribution of the other periodicals? A. None whatever.

Q. How large an area does the Washington News Company supply? A. We supply the city of Washington and a great deal of the trade down far as and including Florida.

Q. Are your news dealers all, or nearly all in the cities? A. Oh, yes.

130 Q. I mean are all your news dealers located in cities? A. Oh, yes.

Q. How many copies of Tip Top Weekly do you usually have orders for? A. My last order was for 1700 copies.

Q. How many orders do you commonly have for the publication known as Work and Win? A. My last order was for 625 copies.

Q. Is there any special provision made by the publisher of the Tip Top Weekly as to the price of the return copies? A. Yes, they are received at a reduced rate.

Q. Will you explain what that is? A. The copies the news dealers pay 3½ cents a copy for, are only allowed 3 cents if returned.

Q. What happens to the news dealer if he fails to sell a copy? A. He loses a half a cent.

Q. Do you understand what the purpose of that arrangement or provision is in the course of dealing between publisher and news dealer? A. To keep returns out.

Q. By "returns," what do you mean? A. Unsold copies.

Q. If a news dealer should order more copies than he can sell, what is the effect upon him? A. He loses a half a cent on those he sends back.

131 Cross-examination.

By Mr. McNAMARA:

Q. Mr. Spangler, is the Washington News Company you say a branch of the American News Company? A. Yes.

Q. And you are the manager of this branch? A. Yes.

Q. Where is the American News Company situated? A. In New York City.

Q. Has it other branches besides the Washington News Company? A. Yes.

Q. About how many other branches has it, if you know? A. About fifty.

Q. In the larger cities, I suppose? A. Yes.

Q. Do you handle magazines, periodicals and light literature generally? A. Yes.

Q. You handle also newspapers? A. Yes.

Q. It is true, is it not, that you handle the daily newspapers of New York and Philadelphia? A. Yes.

Q. Whence do you receive these different magazines, periodicals and newspapers? A. From the publishers.

Q. Do you receive any from the American News Company? A. We receive some from the publishers and some from the

132 American News Company, but all are billed through the American News Company.

Q. In the case of those magazines which are received direct from

POOR COPY

the publishers you also get a statement for the billing from the American News Company? A. Yes.

Q. So you have your transactions with the American News Company? A. Yes.

Q. And not with the publishers? A. No.

Q. Taking the publications we were talking about, Tip Top Weekly and Work and Win, do you receive those direct from the publisher or the American News Company? A. Well, I really could not say whether we get them direct or through the American News Company.

Q. After you get them here in Washington, what do you do with them then? A. We distribute them to the news dealers.

Q. And the territory you cover you say is Washington and the cities in the south as far as Florida? A. Yes.

Q. You receive orders I suppose from the news dealers in this territory? A. Yes.

Q. Of course you have no knowledge as to the dealings of these news dealers with their customers, have you? A. No.

Q. So your answer that they base their orders with you on
133 the customers they have, is simply an ordinary business inference? A. Yes.

Q. Now, it is true, is it not, you ship your newspapers, the metropolitan dailies and Philadelphia papers to Washington and the south? A. We do not have any trade in the south on daily papers.

Q. How about the regular trade in Washington? A. We deliver that.

Q. Does your delivery of the New York papers to your Washington customers differ from the delivery of Tip Top Weekly and Work and Win? A. No.

Q. When you say that your orders of Tip Top Weekly were 1700, and Work and Win 625, as of what date were those orders? A. I cannot tell you the exact date, but it was the last week's supply.

Q. How do those figures compare with orders in the previous months? A. About the same.

A. And would that be true a year or two years back? A. I think so.

Q. Have you any knowledge of the amount of copies of Tip Top Weekly and Work and Win sent through the other branches of the American News Company? A. No.

Q. How many of those copies, do you recall, were re-
134 turned through you? A. As nearly as I can state, about 15 per cent.

Q. All of the people with whom you have your business relations in delivering these copies of Work and Win and Tip Top Weekly were news dealers proper, were they? A. Yes.

Q. Not ordinary individuals? A. No.

Q. Could you tell about how many of the news dealers in Washington whom you supply with magazines proper also take from you Work and Win and Tip Top Weekly? A. Nearly all of them—nearly if not all.

Q. Do you supply the hotels with these papers? A. Some of them.

Q. Do you supply the clubs? A. No.

Q. Libraries? A. No.

Q. I suppose you supply the railroad stations? A. Yes.

Q. Well, when you ship these papers from Washington to the south, do you do it by mail or express? A. Both.

Q. With reference both to Tip Top Weekly and Work and Win? A. Yes.

Q. Who pays the postage when you mail them? A. We pay it and charge it to the dealers.

Q. How do you receive your copies—by mail or by express? A. By freight.

Q. You mean from New York? A. Yes.

135 Q. Who pays for that? A. We do.

Q. What does New York pay for them? A. They don't pay anything; we have to pay it.

Q. Do you mean to say the American News Company don't pay anything? A. The American News Company—when I say the American News Company I mean the same as us.

Q. So these publications, Tip Top Weekly and Work and Win are shipped by freight from New York to Washington, and you mail them or express them to your dealers? A. Yes.

Q. And charge the cost thereof to the dealers? A. Yes.

Q. Do you give the dealers any credit for that? A. Not for the out-going; but to some few dealers we allow the return charges.

Q. Take the cases of the dealers who receive the Tip Top Weekly and Work and Win who live out-side of Washington in your territory. Do you compel them to pay for the cost of transportation? A. Yes.

Q. Now what charge do you make against them for the copies themselves? A. 3½ cents a copy.

Q. And charge the postage or express extra? A. Yes.

Q. In the event they are unable to sell these copies, which as you say amounts to about 15 per cent. and they return them to you, do you allow them credit for the expressage or

136 postage they have to pay? A. Some few dealers, yes.

Q. To some few dealers in Tip Top Weekly and Work and Win? A. Yes.

Q. What day of the week do you get these shipments? A. I really cannot say.

Q. Is it before Saturday, if you know? A. Yes.

Q. A couple of days? A. Yes.

Q. Do you get any orders through your dealers for back numbers? A. Yes.

Q. How many? A. I cannot tell exactly; some times very large and some times very small ones.

Redirect examination.

By Mr. GLASSIE:

Q. Are these shipments regularly made? A. Yes.

Q. Do they come on a stated day of the week? A. Yes.

POOR COPY

Q. For each publication? A. Yes, pretty regularly; some times the freight is held up and it is a day or so late.

Q. Do you recall what day Tip Top Weekly appears? A. On sale?

1137 Q. Yes. A. I think Thursday.

Q. Do you recall the day that Work and Win appears on sale? A. I think the same day.

Q. Will you state the titles of some other publications that you distribute? A. The American Magazine; Everybody's Magazine; Pearson's; Collier's Weekly; Ladies' Home Journal; Saturday Evening Post; Wild West; Secret Service; Gunter's; Popular Magazine; Smith's Magazine; Ainsley's Magazine; Peoples' Magazine; McClure's; Century; Harper's; Strand; Red Book; Blue Book; Harper's Weekly; Leslie's Weekly.

Q. How does the distribution of Tip Top Weekly differ from the others you have mentioned? A. There is no difference at all.

Recross examination.

By Mr. McNAMARA:

Q. Nor does it differ, as I understand your testimony, from the distribution of the newspapers? A. No, with the exception that we deliver the newspapers and count them out as we deliver them, and the magazines are counted out as they leave our establishment.

Q. Besides the papers and the magazines you have mentioned, do you distribute also other publications? A. What publications have you reference to?

Q. Any other weekly or monthly publications? A. Oh, yes, I did not name half of them.

Q. Did you have occasion to distribute these Riverside Series (referring to books in his hand) at the time they were current?

1138 Mr. GLASSIE: I object to the question as the witness has shown no knowledge of the matter and is thus disqualified; and I move to strike it and the answer out.

A. That was before I was connected with the company, but I presume so.

Q. Could you investigate the books of your company and ascertain whether or not they did distribute the Riverside Series? A. Yes.

Q. I wish you would do that for me. A. I will.

Q. Do you distribute the publication known as the Photo Era? A. Yes.

Q. And a publication, the title of which I think is International Studio? A. Yes.

Re-redirect examination.

By Mr. GLASSIE:

Q. Since you have been connected with the American News Company, have you distributed any copies of the publication known as the Riverside Series? A. Not from the Washington branch.

Q. How long have you been connected with the Washington branch? A. About twelve years.

Q. Have you distributed any from any other branch? A. I cannot say as to that.

139 Q. The International Studio referred to by Mr. McNamara is the art journal with a brown cover? A. Yes.

JAMES O. SPANGLER.

Subscribed and sworn to before me this 11th day of June, 1908.

FRANK D. BLACKISTONE,
Examiner.

It is stipulated that the testimony of this witness taken in this cause may be read so far as the same is material or relevant in the case of Frank Tousey, a corporation vs. George von L. Meyer, Postmaster-General, in like manner as if taken in that cause, said cause being Equity, No. 27280.

Mr. GLASSIE: In connection with the testimony of this witness, as well as with that of the witness Smith, with respect to the distribution of the copies of the publications in issue, I offer as evidence of the custom of the trade and of the periodical publishing business in the United States, the statements in the Report of the Joint Commission of Congress authorized to make inquiry regarding second class of mail matter, respecting the proportion of periodical circulation made direct to the subscriber through the mail.

Mr. MCNAMARA: To this proffer of testimony I object on the ground that such report is not proper proof of such course of business or trade, and is hearsay; that it is tentative only, and has no effect in the interpretation of any law and not competent to change the construction of any present law and that it has no force or relation to the judgment of this defendant made in the exercise of his official duty and in his discretion in passing upon the status

140 of the publications involved herein, and the classification of the same in the second class or the third class of mail.

Mr. GLASSIE: We further offer in evidence and ask the court to take judicial notice of the hearings before the Postal Commission authorized by Act of Congress approved June 25, 1906, to make inquiry regarding second class mail matter, said hearings being offered, and notice being given that they will be referred to, as public records and documents showing the general and public understanding of the general customs and course of business of the publishers of periodical publications in respect of their circulation through news agencies.

Mr. MCNAMARA: Please enter the same objection to this offer.

Mr. GLASSIE: In continuation of the previous offers of exhibits for the purpose of showing that the exclusion of the complainants' periodicals is a purely arbitrary, capricious, unreasonable and discriminatory exclusion and not the result of any settled or uniform construction of the law, and that such exclusion effects a denial to the complainants of the equal protection of the laws and deprives them of their property without due process of law, we now offer copies of the following publications, passing through the mails as

POOR COPY

econd class matter and admitted as such and regularly transmitted
such:

Lippincott's Monthly Magazine, Dec. 1907, No. 480.

11 Profitable Advertising, April, 1907.

The Philistine, August, 1907, Vol. XXV, No. 3.

The Little Devil, May, 1907, Vol. III, No. 5.

The Little Pilgrim Lesson Pictures, Vol. XIX, No. 3, Parts 1-13.

The Westminister Lesson Cards, Vol. XIV, No. 3, Parts 27-39.

The Berean Lesson Pictures, 3d Quarter, Vol. XIX, No. 3, Parts 1-13.

The Westminister Lesson Leaf, Published monthly in weekly parts by the Pres. Board Pub. and Sabbath School work, Vol. 35, No. 9, Parts 35 to 39.

The Westminister Primary Quarterly, 3d Quar., 1907, Vol. VI, No. 3.

The Westminister Junior Quarterly, 3d Quar., 1907, Vol. XXIII, No. 3.

The Westminister Senior Quarterly, 3d Quar., 1907, Vol. XXVIII, No. 3.

The Berean Intermediate Quarterly, 3d Quar., 1907, Vol. XXV, No. 3.

The Illustrated Berean Quarterly, 3d Quar., July, 1907, Vol. X, No. 3.

The Senior Berean Lesson Quarterly, 3d Quar., July-Sept., 1907, Vol. XXV, No. 3.

The Shorter Junior Lesson Quarterly, 3d Quar., 1907, Vol. XXV, No. 3.

Advance Sheets, U. S. Reports, Vol. 188, Pt. 1, from November to July, inclusive.

Advance Sheets, U. S. Reports, Vol. 188, Pt. 2, from November to July, inclusive.

The Official Guide of the Railways, Steam & Navigation Lines of the United States, etc., April, 1907, 39th year, No. 11.

United States Official Postal Guide.

The Black Cat, July, 1907, Vol. XII, No. 10, Whole No. 142.

112 Mr. McNAMARA: We object to the introduction of all of these magazines in evidence as not being competent to explain or in any way decide the question at bar, and having no relation to the decision of the defendant, on matters of fact and law involved in his exclusion of the publications Tip Top Weekly and Work and Win from the second class of mail. Such a decision by the defendant is made after his investigation of questions of fact which he is empowered to ascertain and decide, and his decision made in his discretion is not subject to a review or a reconsideration by the court.

Mr. GLASSIE: For the purpose of showing the essential difference between the publications involved in these cases, and those passed upon in the case of Payne vs. Houghton, 22 App. D. C., 234, and 194 U. S., 88, we offer copies of the publications involved in that suit and referred to by the Court of Appeals in its opinion.

1. Riverside Literature Series, No. 1: Evangeline, by H. W. Longfellow.

2. Riverside Literature Series, No. 140 (Quintuple Number) Henry Esmond, by William M. Thackery.

3. Riverside Literature Series, No. 143: Plutarch's Life of Alexander the Great.

Mr. McNAMARA: To all of the foregoing offer I object on the ground that it has no bearing on the question at bar.

143 Mr. GLASSIE: For the purpose of indicating briefly the extent to which literature recognized as proper for the young, deals with the exciting, the marvelous and the adventurous, we offer copies of the following works:

Wonderful Fairy Stories for Children.
Arabian Knights.
Treasure Island, by Robert Louis Stevenson.
The Red Fairy Book, edited by Andrew Lang.
The Blue Fairy Book, " " " "
The Yellow Fairy Book, " " " "
The Strange Case of Dr. Jekyll and Mr. Hyde, by Robert Louis Stevenson.
New Arabian Knights, by Robert Louis Stevenson.
The Murders of the Rue Morgue, by Edgar Allen Poe.
Hans of Iceland, by Victor Hugo.
The Tribulations of a Chinaman, by Jules Verne.
Robinson Crusoe, by Daniel Defoe.
Soldiers of Fortune, by Richard Harding Davis.
Captain Macklin, " " " "
Prisoner of Zenda, by Anthony Hope.
A Study in Scarlet, by A. Conan Doyle.
The Hound of the Baskervilles, " "
Sunset Pass, by Gen. Charles King, U. S. A.
She, by H. Rider Haggard.
Ayshe, " " "
The Mystery of Marie Roget, by Edgar Allen Poe.
Eugene Aram.
The Adventures of Allen Quatermain, by H. Rider Haggard.

144 Macaire, by Robert Louis Stevenson.
The Iron Pirate, by Max Pemberton.
Cast up by the Sea, by Sir Samuel Baker.

Copy of an illustrated article in the Washington Post for August 11th, 1907, entitled "A thrilling battle with an eagle" in connection with Tip Top Weekly No. 588, July 20th, 1907.

Collier's for February, 1905, Vol. XXXIV, No. 18. "The Adventure of the Second Stain," by A. Conan Doyle.

Collier's for January 21, 1905, Vol. XXXIV, No. 17. "Raffles, the Amateur Cracksman;" "The Chest of Silver," Cyrus Cuneo.

Mr. McNAMARA: We object to the offer upon the ground of its incompetency to explain or to decide any of the questions involved herein, nor do we admit the statement that all of the books contained in the list so offered are proper for the young.

Thereupon adjourned to meet, subject to notice.

115 WASHINGTON, D. C., MONDAY, *July* 20, 1908 —
3 o'clock p. m.

Met pursuant to notice at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Present:

On behalf of the complainants, Henry H. Glassie, Esq.

On behalf of the defendant, Stuart McNamara, Esq., and the Examiner, Frank D. Blackistone.

Mr. GLASSIE: In continuation of the previous offers of Exhibits showing that the exclusion of complainants' periodical is purely arbitrary, and not the result of any settled or uniform construction of the law, we offer copies of the following publications now admitted as second class matter, and transmitted by the Post Office Department as such:

The Red Book, July, 1908, Vol. 11, No. 3.

The Blue Book, June, 1908.

Masters-in-Art, A Series of Illustrated Monographs, Issued Monthly, March, 1908, Part No. 99, Volume 9, Maes.

The Burr McIntosh Monthly, July, 1908, Vol. XVI, No. 64, (which copies were duly marked by the Examiner "Complainants' Exhibits," and signed by him.

Mr. MCNAMARA: To the introduction of these Exhibits
116 counsel for the defendant objects on the ground that they are irrelevant, and that the decision, if any, made in those cases is not binding on the decision of the defendant in the course of his administration of the Post Office Department, nor in his view of the law and facts raised in the case of complainants.

Mr. GLASSIE: We offer in evidence the following portions of the hearings before the Postal Commission authorized by Act of Congress approved June 26, 1906, to make inquiry regarding Second Class Mail Matter, and the Report of the Postal Commission authorized by said Act of Congress:

Mr. MCNAMARA: I object to the introduction of these papers on the ground that they are incompetent and irrelevant; they are incompetent among other grounds in that the discussions before a Committee are in no wise calculated to interpret the law or facts, and are irrelevant, among other grounds in that they have no relation, legally or otherwise, to the decision of the defendant made in the course of his administrative duties. For convenience of the record, I consent to the incorporation of the papers prepared by Mr. Glassie into the record, saving my objection of course to the presence of the papers, and their offer as proof of any kind whatever.

117 "Basing our estimates on data furnished by a number of morning and evening newspaper, we say that about 82 per cent of daily newspapers' circulation is in the city of publication and 18 outside, of which 6 per cent goes into the mail and 12 per cent by express or railroad company or on special trains.

Hearing, Postal Commission on Second Class Mail Matter, p. 162.

"In New York City the daily newspapers use 180,000 tons of print paper per annum, and they send 10,000 tons per annum

through the mail, for which they pay $200,000. These figures establish that we send less than 6 per cent."

Hearings, Postal Commission on Second Class Mail Matter, p. 162.

"The Government has a monopoly of the business of carrying to the single mail subscriber, but it obtains only a part of the *much larger* shipment of daily newspapers which goes in bundles to country agents."

Hearings, Postal Commission on Second Class Mail Matter, p. 163.

"The VICE-CHAIRMAN: What is the extent of the practice of the papers in your association, in the use of express and freight for transportation? You mentioned at one point where there was one paper, I think, that transported only about 2 per cent by mail."

"Mr. NORRIS: The New York Evening World sends only two-thirds of 1 per cent.

The VICE-CHAIRMAN: Only two-thirds of 1 per cent of its entire output?

Mr. NORRIS: Of its entire output. The Chicago Daily News, which has probably the largest output, other than the New York Evening Journal, has 2 per cent of its circulation in the mail."

Hearings, Postal Commission on Second Class Mail Matter, p. 168.

"Mr. NORRIS: Our (that is, the New York Times) subscription list is 6 per cent of our total.

"Senator CARTER: Of the total output?

"Mr. NORRIS: Of our total circulation.

"Senator CARTER: That would probably be considerably above the average.

Mr. NORRIS: I think considerably over the average output of daily newspapers."

Hearings, Postal Commission on Second Class Mail Matter, p. 171.

148 "At first a large part of the circulation of newspapers and periodicals was directly to subscribers. But, as time went on, the conditions were changed, and the bulk of the mailings became the mailings from publishers to news agents, and from news agents to other news agents."

Hubbard, Asst. Postmaster, Chicago, in Hearings, Postal Commission on Second Class Mail Matter, p. 112.

"We have, moreover, the calculations made by Mr. Hubbard, the only figures on the subject presented to the Commission, tending to show that while the labor cost of handling 'fully routed second class bulk mail' at the office of origin is approximately 4 cents per 100 pounds, the labor cost of handling unseparated, unrouted mails is approximately 41 cents per 100 pounds, or nearly one half the amount received as postage."

Report of Postal Com., p. 24.

POOR COPY

149 For the convenience of counsel, as well as of the court, we offer, and give notice that we shall also ask the court to take judicial notice of, the following matters of history and governmental action leading up to and attending the enactment of the statute in question here, the act of March 3, 1879, Chapter 180:

1. The report of the Postmaster-General for the year 1877, page XXX, and the report on classification of mail matter from the office of the Assistant Attorney General for the Post Office Department by A. H. Bissell dated November 17, 1877, as found in said report of the Postmaster-General at page 242, et seq.

2. The letter of the Postmaster-General to the House Committee on Post Offices and Post Roads under date of April 23, 1878, especially the following portion thereof:

"The bill (H. R. 3850) reported by your Committee is intended "to remedy this evil by simplifying the law, and providing for a "uniform construction thereof. The main features of the bill and "most of its details have been agreed upon by your Committee after "careful consideration, by the officers of this Department and the "representatives of the publishing interests of the country."

3. Also the report of the Postmaster-General for the year 1879, pages 8, 34, 35, 250, 257, especially the following:

"The law providing for a new classification of mail matter and "readjusting the rates of postage thereon passed at the last Session "of the 45th Congress, which went into effect on the first day of "May last, has given universal satisfaction. In framing
150 "regulations to carry it into successful operation the Depart- "ment has endeavored to display the same liberal spirit "which actuated Congress in its passage. Such reports as have been "received from various officers of the service show that it is better "understood by the public than the former law, has served very "much to diminish complaint against the administration of the "different Post Offices throughout the country and has removed "very much of the friction that existed in the service under the "old law. Especially is this true in respect to second class matter."

Mr. McNAMARA: We object to the introduction of this report on the ground that it is irrelevant and incompetent to any of the issues raised in this cause.

For the purpose of aiding the memory and understanding of the court as to matters of contemporaneous history throwing light on the meaning and purposes of the Act of March 3, 1879, we request the court to refresh its recollection by reference to the following contemporaneous documents:

Publishers' Weekly, Vol. 12, pages 517 and 518.
" " Vol. 13, pages 319, 441.
" " Vol. 14, pages 296, 414, 779, 804.

Also the letter of A. H. Bissell, law clerk in the Post Office Department written on October 22, 1877, and accompanied by a draft entitled, "A Bill for an Act relative to classification and rates
151 of postage of matter deposited For Transmission through the Mails" as the same appears in the Publishers' Weekly of

volume 12, pages 517, 518, the following extracts from which I request the Examiner to incorporate in the record:

Mr. McNAMARA: We object to the introduction of these papers on the ground that they are incompetent and irrelevant to any of the issues raised in this cause, but consent to the copies in lieu of the originals.

152 *History of the Act of March 3, 1879, Ch. 180, Sec. 7-25 (20 Stat. L., 355.)*

In order that the Post Office Department might obtain the benefit of the views of the periodical publishers upon the legislation which it is proposed to ask of Congress, Mr. A. H. Bissell, Law Clerk of the Post Office Department on October 22, 1877, by direction of the Post Master General set to the Editor of the Publishers' Weekly of New York, the recognized organ of the publishing interests in the United States, for publication in that journal a letter accompanied by a draft of a bill which it was proposed by the Department to lay before Congress. The material parts of said letter and draft bill are as follows:

POST OFFICE DEPARTMENT, *October* 22, 1877.

SIR: Annexed you will find a draft of a bill upon the much controverted subject of classification of mailable matter and rates of postage thereon, which — is proposed to lay before Congress at its approaching regular session. It has been prepared with great care and it is designed to remedy some of the evils growing out of the present statutes upon that subject, and to avoid if possible many of the annoyances to which the Department has been subjected under their operation.

It will be observed that it makes no change in the present rates of postage.

The merits claimed for it are:

1. Simplification in the classification. It puts all newspapers, periodicals, etc., in the second class, whether sent from office of publication or news agencies, or between individuals with two rates—the "privileged" for the former and the "ordinary" for the latter. It also avoids the enumeration of matter of the third class.

2. Enlargement of the privilege heretofore regarded as "printed matter." Vide, Sec. 5.

153 3. Protection from interference of all the legitimate publications of this Act under the registration system. The fee cannot be regarded as burdensome and is only to cover expenses which may grow out of the system.

4. Permanence and uniformity in the rulings of the Department.

It is not claimed for the bill that it is perfect in its present shape, and the object of this calling attention to it is that a free discussion of its merits and demerits may be had, and advantage taken of any pertinent suggestions that shall aid in perfecting it.

154 A Bill for an Act Relative to Classification and Rates of Postage of Matter Deposited for Transmission Through the Mails.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 1. That mailable matter shall be divided into three classes:

First. Letters and postal cards.

Second. Regular printed matter.

Third. Miscellaneous printed matter, merchandise, as now provided by law.

Sec. 2. That mailable matter of the first class shall embrace letters, postal cards, and all correspondence wholly or partially in writing except book manuscript passing between authors; and publishers; proof sheets and corrected proof sheets.

Sec. 3. That mailable matter of the second class shall embrace all matter exclusively in print which is, or has been regularly issued from a known office of publication, without addition of by mark or sign.

* * * * * * *

Sec. 6. There shall be two rates for mailable matter of the second class, to wit: "privileged rate" and "ordinary rate." Publications registered as herein provided shall be entitled to pass through the mails at the "privileged" rate; all others shall be subject to the "ordinary" rate.

Sec. 7. From and after the passage of this act, publishers of mail matter of the second class who may desire to secure their publications the benefit of the "privileged" rate of postage, shall submit the same to the Department, under such regulations as the Postmaster General may prescribe, who shall cause the same to be examined and, if determined to be entitled to the benefits of the "privileged" rates, shall cause a license or certificate of registration to be issued to the Postmaster at the place where such publication shall be published, who shall notify the publisher of the same to that effect.

* * * * * * *

Sec. 11. The conditions upon which a publisher shall be admitted to the privilege of registration are as follows:

First. It must be regularly issued at stated intervals.

Second. It must be issued from a known office of publication.

155 Third. It must consist mainly of public news or of articles relating thereto of either a general or special character, or of literary matter, in either case with or without advertisements; provided, however, that nothing herein contained shall be so construed as to admit books, either bound or unbound, or publications which, although issued in a regular series or successive numbers are but books or reprints of books, to the benefit of the "privileged" rate.

Publishers' Weekly, Vol. 12, p. 547, 548. — 1877.

156 For the convenience of counsel as well as of the court, we offer from the journals of the two Houses of Congress and the original copies of Bills on record therein, the following legislative history of the sections of the Act of March 3, 1879, Chapter 180, involved in this cause. Each of the entries in the journals and the excerpts from the bills are offered in evidence, and we also offer the memorandum of them merely as an aid to the memory and understanding of matters of which the court will, as we believe, take judicial notice.

Mr. McNAMARA: We object to the introduction of these papers on the ground that they are incompetent and irrelevant to any of the issues raised in this cause, but consent to the incorporation into record of the memorandum of the general references and excerpts from bills in place of the production of the original journal and bills, reserving all objection to the competency and relevancy of the originals.

157 *History of the Act of March 3, 1879, Ch. 180, Sec. 7-25 (20 St. L., 355).*

Proceedings in the House of Representatives.

Nov. 22, 1877. H. R. 1546.

Mr. Money by unanimous consent introduced the following bill:

A bill providing for the classification of mail matter and postage chargeable thereon.

Read twice, referred to the committee on Post Offices and Post Roads and ordered to be printed.

This bill contained the following provisions:

"Sec. 4. That mailable matter of the second class shall embrace all matter exclusively in print, without addition by writing mark or sign, except as provided in section eighteen, proof sheets and corrected sheets."

"Sec. 5. That there shall be two rates for mailable matter of the second class, to-wit: the "privileged" rate and "ordinary" rate. Publications registered as hereinafter provided shall be transmitted through the mails at "privileged" and other matter of this class shall be charged with the "ordinary" rate.

"Sec. 10. That the conditions upon which a publication shall be admitted to the privilege of registration are as follows:

First, it must be regularly issued at stated intervals.

Second, it must be issued from a known office of publication.

Third, it must be originated and published for dissemination of information of public character or upon some special subject or devoted to literature, the sciences, arts or some special industry and having a legitimate list of subscribers.

Provided, however, that nothing herein contained shall be so construed as to admit publications which although issued in regular series or successive numbers are but reprints of books to the benefit of the privileged rate.

POOR CO

Fourth, it must be printed and published in the United States.

House Bills, 45 Cong., 1 Sess., 1461-1760. Vol. V.
Journ. H. R., 45 Cong., 1 Sess., p. 250.

158 Mar. 16, 1878. H. R. 3850.

Mr. Waddell reported from the Post Office Committee a bill with the same title as H. R. 1546.

Read twice, recommitted to committee on Post Offices and Post Roads and ordered to be printed.

This bill contained the following provisions:

"Sec. 9. That the conditions upon which a publication shall be admitted to the privilege of registration are as follows:

First. It must be regularly issued at stated intervals as frequently as four times a year and bear a date of issue or be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding such as distinguishes printed books for preservation from periodical publications.

Fourth. It must be originated and published for dissemination of information of a public character or devoted to literature, the sciences, art or some special industry and having a legitimate list of subscribers.

Provided, however, that nothing herein contained shall be so construed as to admit to the registered rate regular publications designed primarily for advertising purposes or for free circulation or for circulation at nominal rates."

House bills, 45 Cong., 2 Sess., 3886-3895, Vol. XI.
Journ. 45 Cong., 2 Sess., p. 60.
Cong. Rec., 45 Cong., 2 Sess., Vol. VII, p. 180.

Apr. 16, 1878. H. R. 3850.

Reported by Mr. Waddell with amendments, committed to committee of the whole house on the State of the Union and ordered to be printed.

The 9th section of this bill H. R. 3850 amended is precisely the same as the foregoing 9th section of H. R. 3850 with the change of the word "or" to "and" shown by italics.

"First. It must be regularly issued at stated intervals as frequently as four times a year, bear a date of issue, *and* be numbered consecutively.

House bills, 45 Cong., 2 Sess., 3586-3895, Vol. XI.
Journ. 45 Cong., 2 Sess., p. 855.
Cong. Rec. 45 Cong., 2 Sess., Vol. VII, p. 2581.

159 Under date of April 23, 1878, the Postmaster General wrote to the Chairman of the House Committee of the Post Offices and Post Roads "The Bill (H. R. 3850) reported by your committee is intended to remedy this evil by simplifying the law and providing for a uniform construction thereof." The main features of the bill

and most of its details had been agreed upon by your committee after careful consideration, by the Officers of this Department and the representatives of the publishing interests of the country."

Jan. 7, 1879. H. R. 5735.

Mr. Waddell from the committee on Post Offices and Post Roads reports the following bill as a substitute for H. R. 3850.

A bill relating for the classification of mail matter and rates of postage thereon.

Ordered to be printed and recommitted.

The bill contained the following provisions:

"SEC. 5. That mailable matter of the second class shall embrace all newspapers or periodical publications which have been duly registered as hereinafter provided and which comply with the following conditions.

Same as H. R. 3850 amended. "First. That it must be regularly issued at stated intervals as frequently as four times a year, bear a date of issue and be numbered consecutively.

Same as H. R. 1546 & H. R. 3850. "Second. It must be issued from a known office of publication.

Same as H. R. 3850. "Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes books for preservation from periodical publications.

Same as H. R. 3850 except words italicized "Fourth. It must be originated and published for the dissemination of information of public character or devoted to literature the sciences arts or some special industry and having a legitimate list of *paid subscriptions or orders from news agents. Provided, however,* that nothing herein contained shall be so construed as to admit to the *second class* publications designed primarily for advertising purposes or for free circulation or for circulation at nominal rates."

House bills, 45 Cong., 5501-5750, Vol. XVIII.
Journ. H. R., 45 Cong., 3 Sess., p. 142.
Cong. Rec., 45 Cong., 3 Sess., Vol. VIII, p. 361.

Jan. 21, 1879. H. R. 3850.

Committee discharged as to H. R. 3850 matter made special order for Jan. 23, 1879.

Journ. H. R., 45 Cong., 3 Sess., p. 247.

160 Jan. 23, 1879. H. R. 3850. H. R. 5735. H. R. 6147.

Mr. Waddell from committee on Post Offices and Post Roads reported bill H. R. 6147 as a substitute for and with the same title as H. R. 3850 and being in substance H. R. 5735.

Journ. H. R., 45 Cong., 3 Sess., p. 250.
Cong. Rec., 45 Cong., 3 Sess., Vol. VIII, p. 689-690-696.

Jan. 23, 1879. H. R. 6143.

Mr. Blount from committee on Appropriations reports bill making appropriation for service of the Post Office for the fiscal year ending June 30, 1880, Post Office Appropriation Bill. No Sections as to the classification of mail matter.

Journ. H. R., 45 Cong., p. 256.
Cong. Rec., 45 Cong., 3 Sess., Vol. VIII, p. —.

Jan. 30, 1879. H. R. 6143.

Post Office appropriation bill passed by house with no sections respecting classification of mail matter.

Journ. H. R., 45 Cong., p. 322.
Cong. Rec., 45 Cong., 3 Sess., Vol. VIII, p. —.

161 Jan. 23, 1879. H. R. 3850. H. R. 5735. H. R. 6147.

In reporting from the Committee on Post Offices and Post Roads H. R. 6147 as a substitute for and with the same title as H. R. 3850, Mr. Waddell said

Mr. WADDELL: "I am instructed by the Committee on the Post Office and Post Roads to offer as a substitute for the bill on the calendar (which is House bill No. 3850, providing for the classification of mail matter and the rates of postage thereon) that which I send to the Clerk's desk and which is in substance House Bill No. 5735 of the same title.

The bill which I now present for the consideration of the House I believe has received as mature consideration as any proposition which has ever been submitted to Congress. It is approved not only by the Post Office Department, but by the publishers of the country of all kinds of publications, and it has been carefully considered for the past eighteen months by the Committee on the Post Office and Post Roads of this House.

More than a year ago, Mr. Speaker, appreciating the necessity for a change in the law, and recognizing the fact that some responsibility rested upon me in connection with this subject as chairman of that Committee, I visited the city of New York and invited the leading publishers, not only of quarterly and monthly publications, but of daily and weekly publications of all kinds, to meet me in consultation at the office of the Postmaster in that city—a gentleman whom I have had occasion heretofore in a report to this House to characterize as the peerless postmaster of New York City.

I want to say in brief that this bill which we offer as a substitute for the calendar bill has not only been maturely considered by the Post Office Department, by all the leading publishers of the country, and by the Post Office Committee of this House, but it must strike everyone who reads its provisions as embracing the fairest and most just arrangement for the classification of mail matter and rates of postage that has ever been presented to the country.

Cong. Rec., 45 Cong., 2nd Sess., Vol. 8, p. 690.

162 *History of the Act of March 3, 1879, Ch. 180, Sec. 7 25 (20 St. L., 355).*

Proceedings in the Senate.

Jan. 17, 1878. S. 539.

Mr. Ferry obtained leave to bring in the following bill:

A Bill

Providing for the classification of mail matter and the rates of postage thereon.

Read twice and referred to the committee on Post Offices and Post Roads.

This bill contains the same provisions for the registration of second class publications as is contained in H. R. 1546 and the 10th section of it is as follows:

"Sec. 10. That the conditions upon which a publication shall be admitted to the privilege of registration are as follows:

First, it must be regularly issued at stated intervals;

Second, it must be issued from a known office of publication;

Third, it must be originated and published for the dissemination of information of a public character or upon some special subject or devoted to literature, the sciences arts, or some special industry and having a legitimate list of subscribers:

Provided, however, that nothing herein contained shall be so construed as to admit publications which, although issued in regular series and successive numbers are but reprints of books to the benefit of the privileged rate:

Fourth, it must be printed and published in the United States.

Senate Bills, 45 Cong., 2 Sess., 521-850, Vol. III.

Journ. Sen., 45 Cong., 2 Sess., p. 96

NOTE.—This Section is identical with Sec. 10 of H. R. 1546 introduced on Nov. 22, 1877.

163 May 15, 1878. S. 1251

Mr. Ferry, from the committee on Post Offices and Post Roads, reported the following bill:

A Bill

Regulating the compensation for the transportation of the mails on railroad routes, providing for the classification of mail and for other purposes.

Read the first and second time by unanimous consent.

This bill contains the following provisions:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at

stated intervals and as frequently as four times a year and which have been duly registered as hereinafter provided.

"SEC. 15. That the conditions upon which a publication shall be admitted to the privilege of registration are as follows:

First. It must be regularly issued at stated intervals, as frequently as four times a year and bearing date of issue and be numbered consecutively;

Second. It must be issued from a known office of publication;

Third. It must be formed of printed paper sheets without board, cloth, leather or other substantial binding such as distinguishes printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry and having a legitimate list of subscribers.

Provided, however, that nothing herein contained shall be so construed as to admit to the registered rate regular publications designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

Senate Bills, 45 Cong., 2nd Sess. — Vol.
Journ. Sen., 45 Cong., 2nd Sess., p. 513.

NOTE. — The provisions of the foregoing Sec. 15 of this bill, S. 1251, are identical with Sec. 9 of H. R. 3850, reported on April 16, 1878 with amendments.

164 Jan. 31 1879. H. R. 6143.

Amendment 20 reported by Mr. Ferry from the Senate Committee on Post Offices and Post Roads to the bill (H. R. 6143) making appropriations for services of the Post Office Department for the fiscal year ending June 30th, 1880, viz: insert the following:

SEC. 12. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals as frequently as four times a year and shall have been duly registered as hereinafter provided.

SEC. 17. That the conditions upon which a publication shall be admitted to the privilege of registration are as follows:

Same as H. R. 3850 amended H. R. 5735

"First. It must regularly be issued at stated intervals as frequently as four times a year and bear a date of issue and be numbered consecutively.

Same as H. R. 1546, H. R. 3850 H. R. 5735

"Second. It must be issued from a known office of publication.

Same as H. R. 3850 and H. R. 5735

"Third. It must be formed of printed paper sheets without board, cloth, leather, or other substantial binding, such as distinguishes books for preservation from periodical publications.

Same as H. R. 3850 except change "registered rate" to "second class rate"

"Fourth. It must be originated and published for the dissemination of information of public character or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Provided, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

House Bills 45 Cong. 5741-6141 Vol XIX.
Journ. 45 Cong. 3 Sess. p. ——.

Jan. 31, 1879. H. R. 6143.

Amendment referred to committee on appropriations and ordered to be printed.
Journ. Sen.,45 Cong., 3 Sess., p. 196.

Feb. 11, 1879. H. R. 6143.

Amendment reported by Mr. Dorsey from Committee on Appropriations without recommendation.
Journ. Sen., 45 Cong., 3 Sess., p. 253.

165 Feb. 20, 1879. H. R. 6143.

Passed by Senate with amendments.
Journ. Sen., 45 Cong., 3 Sess., p. 335.

Feb. 25, 1879. H. R. 6143.

Referred to House Committee on Appropriations and ordered to be printed with amendments of the Senate.
Journ. H. R., 45 Cong., 3 Sess., p. 525.

Feb. 28, 1879. H. R. 6143.

House disagrees to the amendments.
Journ. H. R., 45 Cong., 3 Sess., p. 563.
Cong. Rec., 45 Cong., 3 Sess., Vol. VIII, pt. II., p. 2137, 2372.

Feb. 28, 1879. H. R. 6143.

House disagrees to amendment 20 and conference asked.
Journ. H. R., 45 Cong., 3 Sess., p. 579.

Feb. 28, 1879. H. R. 6143.

Conferees appointed on behalf of House.
Journ. H. R., 45 Cong., 3 Sess., p. 586, 587.

Feb. 28, 1879. H. R. 6143.

Senate insists and agrees to conference.
Conferees appointed on behalf of the Senate.
Journ. Sen., 45 Cong., 3 Sess., p. 421.
Cong. Rec., 45 Cong., 3 Sess., p. ——.

March 1, 1879. H. R. 6143.

Conferees report disagreement. Senate insists on amendments, asks further conference.

Journ. Sen., 45 Cong., 3 Sess., p. 441, 442.

March 1, 1879. H. R. 6143.

House agrees to further conference.

Journ. H. R., 45 Cong., 3 Sess., p. 615.

166 March 3, 1879. H. R. 6143.

Committee on Conference report recommending:

That House recede from its disagreement to the amendment of the Senate number 20 and agree to the same with the amendment as follows: In lieu of the matter proposed to be inserted, insert, among others, the following

Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

Sec. 14. That the conditions upon which publications shall be admitted to the second class are as follows:

First, it must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively;

Second, it must be issued from a known place of publication;

Third, it must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguishes printed books for preservation from periodical publications;

Fourth, it must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation or for circulation at nominal rates.

Journ. H. R., 45 Cong., 3 Sess., p. 651, 652, 653.

March 3, 1879. H. R. 6143.

Committee on Conference reports agreement of House to amendment twenty with amendment.

Journ. Sen., 45 Cong., 3 Sess., p. 472, 473.

March 3, 1879. H. R. 6143.

The Senate disagrees to the report, insists on amendments, asked further conference.

Journ. Sen., 45 Cong., 3 Sess., p. 478.

167 March 3, 1879. H. R. 6143.

House agrees to second Conference report identical with former except "section 32" relating to the introduction of letter sheets and double postal cards.
Journ. H. R., 45 Cong., 3 Sess., p. 666-667.

March 3, 1879. H. R. 6143.

Senate agrees to second report of the Committee on Conference, being the same hitherto submitted with the addition of Section 32 relating to the introduction of letter sheets, envelopes and double postal cards. Senate agrees to report.
Journ. Sen., 45 Cong., 3 Sess., p. 480.

March 3, 1879. H. R. 6143.

Reported examined and found duly enrolled. Signed by the Speaker.
Journ. H. R., 45 Cong., 3 Sess., p. 677.

March 3, 1879. H. R. 6143.

Speaker having signed H. R. 6143 it is examined and found duly enrolled, signed by President pro tem., delivered to the Committee to be presented to the President of the United States.
Journ. Sen., 45 Cong., 3 Sess., p. 486, 487.

March 3, 1879. H. R. 6143.

Approved Act of March 3, 1879, Ch. 180; 20 Stat. L. 355.

Mr. Glassie at this point announced the testimony on behalf of the complainants as closed.

168 *Testimony on Behalf of Complainants.*

In the Supreme Court of the District of Columbia.

Equity. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

WASHINGTON, D. C., SATURDAY, *December* 7, 1907.

Met pursuant to notice at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Present:

On behalf of the complainant, J. J. Darlington, Esq., and Henry H. Glassie, Esq.

Present:

On behalf of the Defendant, Stuart McNamara, Esq., and R. M. Webster, Esq.

Whereupon SINCLAIR TOUSEY, was duly sworn as a witness on behalf of the complainant, and testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. Mr. Tousey, you are connected with the complainant in the case of Frank Tousey Company, vs. Postmaster General George von L. Meyer? A. I am the president of the Corporation.

169 Q. The Frank Tousey Company is a corporation? A. Yes, sir.

Q. And you are the president of the corporation? A. President.

Q. Have you personal knowledge of the business of that corporation? A. Yes.

Q. Will you state whether you are the publishers of the publication known as "Work and Win"? A. Yes, sir.

Q. How long has your company published "Work and Win"? A. About eight years, I think.

Q. Look at the paper I show you, purporting to be a certificate of entry, and state if you know what it is? A. Yes; that is a certificate of entry to second-class matter.

Mr. GLASSIE: We offer in evidence the original certificate of entry of "Work and Win" bearing date, New York, N. Y. December 8th 1898 and ask that it be copied in the record.

3505.

Certificate of Entry of Publication as Second-Class Matter.

(5406.)

POST OFFICE AT NEW YORK, N. Y.,
DECEMBER 8th, 1898.

I hereby certify that the Work and Win, a Weekly, Published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accord-

170 ingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. VAN COTT, *Postmaster.*
Per E. M. MORGAN,
Assistant Postmaster."

Q. From that time until the present, have you been publishing "Work and Win"? A. Yes, sir.

Q. How often do you publish it? A. Once a week.

Q. Will you state whether or not it is regularly published at stated intervals? A. Yes, sir.

Q. Those are what? A. Every Friday, weekly.

Q. How is it with respect to its sheets? A. Thirty-two pages.

Q. Printed paper? A. Printed paper.

Q. Is it bound? A. No; stitched with a paper cover.

Q. Not bound in cloth, leather or other substantial binding? A. No.

Q. Such as distinguish books from periodical publications? A. No.

Q. Does it bear a date of issue? A. It does.

171 Q. Is it numbered consecutively? A. It is.

Q. Is it published from a known office of publication? A. Yes.

Q. What is that? A. Twenty-four Union Square.

Q. Where? A. New York.

Q. Can you state whether it has a list of subscribers? A. Yes; a small list.

Q. Is it designed primarily for advertising purposes? A. No.

Q. For free circulation? A. No.

Q. For circulation at nominal rates? A. No.

Q. Is it numbered consecutively? A. Yes.

Q. Now then with respect to the character of the contents of this publication and the matter to which it is devoted, will you describe that? A. The character is named Fred Fearnot, and he is copied exactly after the character of Frank Merriwell, in the Tip Top. When Mr. Smith described the character of Tip Top, he described the characters of "Work and Win."

Q. Can you state with respect to what class of literature "Work and Win" is published. A. High class juvenile.

Q. What class of readers is it intended for? A. All classes that can read.

172 Q. For adults as well as children? A. Yes, sir.

Q. Is there any class to which it is more especially published? A. Say readers from fifteen years old up. It caters to that class.

Q. What is the circulation of "Work and Win"? A. About forty thousand,—the edition I should say is forty thousand.

Q. Is that edition regularly printed with each issue? A. Yes.

Q. How many copies of that are regularly taken up by the readers? A. The returns average about twenty per cent.

Q. Will you describe the method by which you distribute the copies of the weekly issues? A. Through the American News Company, entirely, except for our small subscription list, individual subscribers. We send all the copies to the American News Company and they distribute them to their branches the same as they do with the other publications for whom they are agents.

Q. Do you know the manner in which the monthly magazines are circulated in this country? A. Well, those magazines for which the American News Company are agents, are distributed the same way as ours, but there are publishers, a few, who are independent of the News Company and who supply news dealers direct.

Q. Can you state with respect to the circulation being handled by the news dealer, or by mail to the subscribers, what the custom is, pursued in this country? A. Through news dealers, mainly.

173 Q. Are you acquainted with the custom and practice of the Post Office of New York and the Post Office Department

Q. Are you acquainted with the practices of the Post Office Department in New York in respect to testing circulation of publications? A. Testing circulations?

Q. Yes. A. No.

Q. Now do you know the method by which the News Company distributes the copies to its branches and to the local dealer? A. Yes.

Q. Will you describe that? A. They have about fifty branches, the American News Company, and every branch of the American News Company and its branches has so many dealers on its books; each dealer takes so many copies a week; the dealers' orders are regulated by the demand and the dealer notifies the branch, the branch he deals with, how many copies he wants of each issue of every publication and the branch notifies the American News Company what their full order is and the American News Company ships in bulk to the branches, and the branches distribute to the dealers.

Q. What is it that determines for the local dealer, any definite number of copies? A. The call for the publication from his regular customers.

Q. Then, if I understand you correctly, the fact that you
174 publish about forty thousand copies as an edition, is determined by the fact that some number approximating that, is called for through the various channels to the central office in New York? A. That is it.

Q. Does your paper appear on any special day? A. Friday.

Q. What, if any, demand is there for your paper after the expiration of the week of issue? A. Very small. All the return copies we cut up and sell as old stock. We keep about fifteen hundred copies, I think, on hand, of each number.

Q. Unsold copies? A. Yes.

Q. What do you keep them for? A. For small orders that come in from readers who possibly have missed some numbers; but the sale for back numbers is very small.

Q. What do you mean by cutting up the returns and selling them as old stock? A. Chopping them in half and selling them for so much a pound.

Q. As waste paper? A. As waste paper.

Q. What is the capital invested in your business? A. Close on to two hundred thousand dollars.

Q. Do you do any other business than publish weeklies of this character? A. No; none.

175 Q. What plant have you? A. What plant?

Q. Yes. A. We have a press room, bindery, have a complete plant for this business entirely.

Q. Have you any building of your own or do you rent quarters? A. Well, I can say no; we rent it.

Q. What does this publication sell for per copy? A. Five cents.

Q. To the reader? A. Five cents.

Q. What do you get for it from the dealer? A. From the news dealer?

Q. Is the business of publishing "Work and Win" a profitable business? A. Very, at the present time.

Q. Has it been so in the past? A. Yes. I would like to ask, Mr. Glassie, —that leads me to say, if I will be permitted, if all of our publications were excluded from the mails as second class, it means ruination to me.

Q. Could you continue to publish these periodicals if they were excluded? A. No; could not.

Q. What would become of your plant? A. Well, I might sell it to Smith.

Mr. McNAMARA: This is all objected to as being irrelevant.

176 Q. What would be the financial loss to your corporation, if in point of fact you were compelled to suspend the publication of these weeklies by this Post Office order? A. By the year; what we make in the year.

Q. No, the total loss to you. A. That is pretty hard to answer. Total loss would be what we are making.

Q. What is your plant worth? A. It is worth about one hundred thousand dollars.

Q. What would it be worth if this order of exclusion of the Postmaster General should stand? A. It would be worth a matter of second hand machinery. Nothing to me, except what I could get for it.

Q. What could you get for it? A. Possibly fifteen or twenty thousand dollars.

Q. Have you any objection to stating the net annual profits of your business? A. I haven't; no; It is about seventy-five thousand dollars a year.

Q. How many publications of this character do you publish? A. Seven.

Q. Are they similar in character to "Work and Win?" A. Yes.

Q. Are they published in the same manner? A. Yes.

Q. Is the circulation in the same manner? A. Yes.

Q. Look at this paper which purports to be a rule to show
177 cause why "Work and Win" should not be excluded from the second-class mail and state whether or not you received that from the post office at New York? A. Yes.

Mr. GLASSIE: A copy of this is annexed to the bill and I offer the original.

Mr. McNAMARA: I offer the same objections to this evidence as were interposed with the similar pieces of evidence offered in the Street and Smith case.

Q. Look at the paper I hand you purporting to be a copy of a letter from the Assistant Postmaster General to the Postmaster at New York, dated July 26, 1907, and state whether or not you received that copy from the Postmaster at New York? A. Yes.

Mr. GLASSIE: We offer in evidence as Tousey number three, this paper which is the order of exclusion.

Mr. McNAMARA: It is stipulated in the record that the objections

interposed in the Street and Smith testimony, without similar objections, will be made in this record as to the introduction of evidence.

Q. Will you look at these publications annexed to the bill in this case as exhibits 3, 4, and 5, state what they are. A. Copies of "Work and Win."

Q. Will you state whether or not those copies are fair samples of the regular issues of that publication? A. They are.

Q. In response to this rule to show cause, which has been offered in evidence, did anybody come to Washington, to represent
178 you at the hearing? A. Yes, sir.

Q. Who was that? A. Mr. Heines.

Q. You did not come yourself? A. No.

It is stipulated between counsel for respective parties that the testimony of Mr. W. H. Heines, given in the case of Street and Smith vs. George von L. Meyer, number 24,279, with all exceptions and objections thereto, may be used and read in this case as part of this record so far as it relates to the subject matter of this suit.

It is also stipulated by and between counsel, that the testimony of Mr. Orville J. Victor, given in the case of Street and Smith vs. George von L. Meyer, Postmaster General, Equity number 27,279, with all objections and exceptions will be considered and read as part of the testimony in this case.

Cross-examination.

By Mr. McNAMARA:

Q. Mr. Tousey, you are the president of this corporation? A. Yes, sir.

Q. It has been incorporated for some time I suppose? A. About three years.

Q. Are you affiliated in any business with the firm of Street and Smith? A. No.

Q. The publication that you issue "Work and Win" is similar to the publication of Dick Merriwell? A. Yes.

Q. Now do I understand that two hundred thousand dollars was about the amount invested in your concern; that is correct is it? And that you earn about seventy-five thousand dollars a
179 year? A. Yes.

Q. How long is your list of subscribers to "Work and Win?" A. How much?

Q. Yes. A. Three hundred individual subscribers.

Q. Have you that list with you? A. I have not.

Q. Will you get it for us? A. Certainly.

Q. Through your counsel and submit it to us. A. Yes.

Q. Now the rest of the issue is handled through the American News Company? A. Yes.

Q. So as far as you know the issue each week is simply turned over to the American News Company for what disposition it may decide on? A. Yes, for what they have orders for.

Q. How are the accounts in turn remitted to you? A. Weekly.

Q. Form the American News Company? A. From the American News Company.

Q. So your business beginning and ending is with the American News Company? A. Entirely.

Q. Who is the hero of "Work and Win?" A. Fred Fearnot.

Q. Has he an associate? A. He has several.

180 Q. How long has he been on the boards? A. Since the day of the beginning of the publication.

Q. What length of time does that cover; how many years? A. Judging from the entry of 1898, about nine years.

Q. Does this take him to college? A. Yes.

Q. And outside of college has he any other adventures? A. All kinds.

Q. Then this publication does not deal exclusively with adventures of a young man in college athletics? A. Mainly.

Q. For the most part? A. I cannot say as to that.

Q. I ask you if the publications of "Work and Win" includes the following titles and adventures.

"Fred Fearnot's Treasure Hunt' or, After the Aztecs' Gold."

"Fred Fearnot and the Cowboy King; or, Evelyn and the 'Bad' Men."

"Fred Fearnot and "Roaring Bill"; or, The Wickedest Boy in the West."

"Fred Fearnot and the Boy Prospector; or, the Secret Band of the Indian Gulch."

"Fred Fearnot and The Diamond Queen; or, Helping the Treasury Department."

"Fred Fearnot and the White Masks; or, Chasing the Chicago Stranglers."

"Fred Fearnot and the Snake-Charmer; or, Out with the Circus Fakirs."

181 "Fred Fearnot Held Back; or, the Time Terry Failed Him."

"Fred Fearnot and the Girl of Gold; or, The Female "Wizard" of Wall Street."

"Fred Fearnot and 'Long Duke'; or, the Toughest Man in Texas."

"Fred Fearnot and the Silver Syndicate; or, Beating the Wall Street Sharks."

"Fred Fearnot and the 'Wharf Rats'; or, solving a North River Mystery."

"Fred Fearnot and 'Ned, the Newsy'; or, The Sharpest Boy in New York."

"Fred Fearnot's Football Boys; or, Winning on the Gridiron."

"Fred Fearnot and the Range Robbers; or, Seeing Justice Done."

"Fred Fearnot's Deal in Diamonds; or, the Strange Man from Africa."

"Fred Fearnot and the Mill Girl; or, The Factory Gang of Fairdale."

"Fred Fearnot's Snow-Shoe Trip; or, a Tough Time in the Rockies."

"Fred Fearnot's Search for Evelyn; or, How She Got Lost."
"Fred Fearnot's Streak of Luck; or, The Gold Gang of Gilt Edge."
"Fred Fearnot and the Kentucky Girl; or, Down in the Blue Grass Country."
"Fred Fearnot and 'Nervy Ted'; or, the Pluckiest Boy in Wall Street."
182 "Fred Fearnot and the 'Yellow Queen'; or, The Mysterious Sign of the Seven."
"Fred Fearnot's Range Riders; or, Hunting down the Outlaws."
"Fred Fearnot and 'Pittsburg Pete'; or, Lively Times in the Oil Country."

Are those among some of the numbers that appear in "Work and Win"?

A. If they are on the list, yes.

Q. Then the character, in the main, is that of adventure and daring? A. Not daring. Adventure.

Q. Is it not true that most of these stories are those of most extraordinary daring on the part of young men? A. No; we try to make Fred Fearnot a model for other young men to follow.

Q. In what way? A. In every way; he doesn't smoke, chew, or drink.

Q. Is he a business man? A. In some ways.

Q. And he is getting his preliminary education in the title of these stories? A. Yes.

Q. You say it is devoted to all classes of readers. It is chiefly, however, devoted to juvenile readers? A. Young readers.

A. And your edition is how much a week? A. Forty thousand, about.

Q. And of that about twenty per cent is returned? A. Yes.
183 Q. You keep back numbers? A. A few copies.
Q. About fifteen hundred? A. It might be two thousand.

Q. You advertise in the issues that these may be procured by the people who read the issues? A. Yes.

Q. When Mr. Heines represented you, Mr. Towsey, when he came to Washington, did he submit his briefs in your behalf? A. He did.

Redirect examination.

By Mr. GLASSIE:

Q. What complainments, if any, do you receive from your readers with respect to the moral tendencies of your publication? A. I cannot recall receiving any.

Q. Do you, on the other hand, receive any commendatory expressions with regard to their moral influence? A. Yes; we have.

Q. Have you them in the form of letters? A. Letters.

Q. Can you produce them, if required? A. Now, I do not know whether we have saved those "Applause" letters or not. We may have them in the office. I will see when I go back if we have. We have a whole sack of them, thousands, not only from readers, but

Q. Is there anything in the treatment of these adventures and scenes of adventure that would have a demoralizing influence
184 upon the reader if he were a young boy? A. No.

Q. Does your publication glorify vice in any form, or lawlessness? A. To the contrary.

Q. Are you acquainted with the general mass of juvenile literature in this country? A. I think so.

Q. Are you acquainted with the story paper commonly published for use in this country. A. Yes; we also publish a story paper ourselves.

Q. Are you acquainted with the juvenile literature of Horatio Alger? A. Yes, sir.

Q. Oliver Optic? A. Yes, sir.

Q. And other writers? A. Yes, sir.

Q. In what respect does the literature contained in your publication differ in tone and character or moral tendency from those that I have mentioned? A. I think that our publications are very similar; just as similar as they possibly could be to those of Oliver Optic and Horatio Alger.

Q. Are you acquainted with the story, which is the work of Robert Lewis Stephenson, known as "Treasure Island"? A. I have not read it.

Q. You say you publish a weekly story paper? A. Yes.
185 Q. What is it called? A. "Happy Days."

Q. For what class of readers? A. Juvenile. The same class as "Work and Win."

Mr. DARLINGTON: It is also stipulated that all testimony taken today in either of these cases, or testimony which may hereafter be taken, will be read by either party in the other case at any hearing thereof, subject to the same objections and exceptions so far as may be specified on the record at the time the testimony was taken.

The WITNESS: I can furnish a copy of "Happy Days" if you would like to have it.

Mr. GLASSIE: You may do that.

Recross-examination.

By Mr. MCNAMARA:

Q. Mr. Tousey, while "Work and Win don't glorify vice in any way, as you state, is it not true that it narrates extraordinary adventures, and in general suggests the call of the wild? A. I should not think so; no.

Q. Do they not tell stories of conquest by young men which are impracticable? A. Not that I know of.

Q. Don't they, as a rule, excite boys into unrest? and excite them to do things that they cannot possibly accomplish? A. No.

Q. You have a publication of "Pluck and Luck"? A. Yes.

Q. I see one issue here, "Carroll Carter the Boy Lawyer, or, a Fee of One Million Dollars." Is that one of your publications?
186 A. If it is on the list it is.

Q. "The Boy Grain Dealer, or, The Speculator of Chicago" that is also one of your publications? A. It is on the list; yes.

SINCLAIR TOUSEY.
By FRANK D. BLACKISTONE,
Examiner.

Subscribed and sworn to before me this — day of ——, 1907.

——— ———,
Examiner in Chancery.

Whereupon an adjournment was taken in this case subject to further notice.

It is stipulated by and between counsel for the respective parties hereto that the Examiner may sign the deposition for and in the place and stead of the witness Sinclair Tousey, on behalf of complainants, said deposition to be read in evidence with the same force and effect as if signed by said witness himself.

187 *Testimony on Behalf of Complainants.*

Filed April 8, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States.

To Daniel W. Baker, Esq., R. Stuart McNamara, Esq., R. M. Webster, Esq., Solicitors for the Defendant.

GENTLEMEN: Please take notice that, in pursuance of the Statutes in such cases made and provided, we shall proceed, on Tuesday, January 21st, 1908, at the hour of two o'clock, P. M., at the Office of Herbert W. Knight, a Notary Public, Prudential Building, 765 Broad Street, Newark, N. J., to take, in the above entitled cause, on behalf of the Complainants, the testimony of the following named witnesses, all of whom live beyond the District of Columbia:

Mr. Edward S. Ellis, whose address is 40 Oakwood Avenue, Upper Montclair, New Jersey.

Mr. Edward J. Stratemeyer, whose address is 171 North Seventh Street, Newark, New Jersey.

Mr. John Cotton Dana, whose address is Public Library, Newark, New Jersey.

The depositions of the above witnesses to be taken before
188 the above named Herbert W. Knight, a Notary Public.

J. J. DARLINGTON,
Per LINTON,
HENRY H. GLASSIE,
Solicitors for Complainants.

Service of the foregoing notice accepted this 16th day of January, 1908.

DANIEL W. BAKER,
Solicitor for Defendant.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States.

To Daniel W. Baker, Esq., R. Stuart McNamara, Esq., R. M. Webster, Esq., Solicitors for the Defendant.

GENTLEMEN: Please take notice that, in pursuance of the Statutes in such cases made and provided, we shall proceed, on Tuesday, January 21st, 1908, at the hour of four o'clock, P. M., at the office of Herbert W. Knight, a Notary Public, Prudential Building, 765 Broad Street, Newark, N. J., to take in the above entitled
189 cause, on behalf of the Complainants, the testimony of the following named witnesses, all of whom live beyond the District of Columbia:

Mr. Edward S. Ellis, whose address is 40 Oakwood Avenue, Upper Montclair, New Jersey.

Mr. Edward J. Stratemeyer, whose address is 171 North Seventh Street, Newark, New Jersey.

Mr. John Cotton Dana, whose address is Public Library, Newark, New Jersey.

The depositions of the above witnesses to be taken before the above named Herbert W. Knight, a Notary Public.

J. J. DARLINGTON,
L.,
HENRY H. GLASSIE,
Solicitors for Complainants.

Service of the foregoing notice accepted this 16th day of January, 1908.

DANIEL W. BAKER,
Solicitor for Defendant.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States.

In pursuance of the foregoing and annexed notice given in the above entitled cause in the Supreme Court of the District of
190 Columbia, I, Herbert W. Knight, a Notary Public of the State of New Jersey, duly authorized and commissioned, certify that I proceeded, on the 21st day of January, in the year of

our Lord nineteen hundred and eight (1908) at the office of myself, Prudential Building, 765 Broad Street, in the City of Newark and State of New Jersey, at 2 o'clock, P. M., pursuant to notice (and in the presence of the counsel of the respective parties), to take the following depositions, de bene esse.

Present: Henry H. Glassie, Esq., on behalf of complainant-; Stuart McNamara, Esq., on behalf of defendant, and R. M. Webster, on behalf of defendant.

It is hereby stipulated by and between counsel that the notice taken by the stenographer when reduced to typewriting shall have the same force and effect as if taken in longhand or in typewriting at the time of the examination, and that the person before whom the deposition is taken may sign for the witnesses.

EDWARD S. ELLIS, a witness of lawful age, produced on behalf of the Complainants being by me first duly sworn according to law, being examined on the following interrogatories to him propounded in that behalf, makes oath, deposes and says as follows, that is to say:

(the counsel for the parties having first consented that the
191 testimony taken under the said commission should be taken stenographically and reduced to typewriting.)

Direct examination.

By Mr. GLASSIE:

Q. Mr. Ellis will you please state your full name and your place of residence? A. Edward S. Ellis: Upper Montclair, New Jersey.

Q. You live beyond the limits of the District of Columbia? A. Yes sir.

Q. Will you state whether or not you are of lawful age? A. Yes, I am.

Q. What is your profession, or occupation, Mr. Ellis? A. Author.

Q. Would you be good enough to state, if you do not mind, the titles of some or all of your works and indicate briefly what their general character is? A. I could not attempt to give all the titles. I have written perhaps seventy-five juvenile books, if not more; several educational books and a number of histories.

Q. Would you mind mentioning the names of the histories that you refer to? A. I have a history of the United States in ten volumes; several smaller school histories; story of the greatest nations in ten volumes. Those are the principal works outside
192 of juvenile books.

Q. Have you ever been connected with the education of boys in any capacity other than as a writer? A. Yes, I have been a teacher in the public schools, tru-tee, and was Superintendent of Schools in Trenton.

Q. By whom were your works published? A. My juveniles are published mainly by the John C. Winston Company, Philadelphia; Dana Estes, Boston, and several others of less importance.

Q. Have any of your books been re-printed abroad or translated in foreign languages? A. Yes; they have been translated in French,

German and Welsh; I haven't seen any others. I saw a copy in Wales and my juveniles are re-printed in London.

Q. Have you received any degree from any institution of learning, Mr Ellis? A. Princeton University gave me the degree of A. M., for my educational writings.

Q. Mr. Ellis, are you acquainted with the general body of juvenile literature published in this country? A. I am, in a general way, yes.

Q. Have you read any considerable number of the issues of the Tip Top Weekly, published by Messrs. Street & Smith, of New York? A. I have.

Q. Look at the papers I now hand you purporting to be copies of the Tip Top Weekly, and marked respectively, exhibits No. 3, 5, 7, and 9, Equity 27279, and bearing the file mark "Filed,
193 August 8, 1907, J. R. Young, Clerk" and state whether or not they are issues of the Tip Top Weekly, which you refer to in your previous answer. A. They all are. I recognize them.

Q. Are you generally acquainted, Mr. Ellis, with the contents of the successive issues of that weekly publication? A. I have read a considerable number of them so as to familiarize myself with them.

Q. Will you be good enough to state to what those issues are devoted? A. They are devoted, so far as I can ascertain, to the exploitation of manly sports, school life and American boyhood. They are essentially American in that they are expositions of boy life which we all recognize, all of us having been boys once.

Q. Can you describe succinctly by way of summary, from your reading what character of stories is contained in these publications? A. I read a large number. I find they all teach sturdy manhood, temperance, integrity, truthfulness and hold up the highest ideals of boyhood. I never found an oath or the remotest concession to *that* may be called passion. The married relations, the duties of children to parents and teachers, the right conduct between boys, are all taught in emphatic and unmistakable terms. I cannot help saying that in my opinion novels that are now issued and for which the public pay a dollar or a dollar and a half a volume do a thousand-fold more harm by corrupting boys and girls
194 than could be done by one of these publications provided they lacked nine-tenths of the merit they now possess.

Q. Well, what, if any tendency towards immorality do you find in these publications? A. There is not the slightest tendency towards immorality.

Q. What is there towards demoralization of a boy's sense of duty? A. They teach in the clearest terms the Golden Rule. Recognized American sports, such as base-ball, foot-ball, boating, skating, hunting and all that is so attractive to boyhood, and the author never leaves any doubt of his condemnation of profanity, drinking, disrespect to parents, untruthfulness and even smoking. For instance, on my way here to-day I read a story entitled "Dick Merriwell's Regret." This is one of the most touching stories that I ever read. It is the story of a boy in college who was lonely and without friends, who suffered so much from hazing that he got pneumonia and died. The effects of his death upon the other stu-

POOR COPY

dents was to make them thoughtful, more kind, more charitable, and to benefit a boy in every respect. I agreed with Mr. Stratameyer that neither of us could read it without feeling a lump in the throat. It is elevating and instructive and cannot fail to do good.

Q. Mr. Ellis, how do the stories in the Tip Top Weekly compare in respect to their general character with the stories contained in the generally recognized monthly magazines? A. I would say
195 that in the magazines the character of the fiction is fitful and uncertain; sometimes it is of most excellent quality. Sometimes it is the opposite. In the Tip Top Weekly the character of the stories is always unexceptional. It is not necessary for the parent first to read one to satisfy himself whether it is safe to put them in the hands of his boy or girl. As regards magazines and current fiction, this is always necessary.

Q. In American literature are there certain works recognized and known as standard juvenile fiction? A. Yes.

Q. Can you state from your reading of the issues of the Tip Top Weekly how the fiction contained in it compares in point, both of moral tone and of literary quality with the generally recognized standards of juvenile fiction? A. Very favorably indeed. I repeat that in moral tone, there can be no criticism. This is the result of a thorough and critical examination on my part.

Q. Are you familiar with the publication known as the Youth's Companion? A. I am; I have been a contributor to it.

Q. Is it recognized as a juvenile journal of the better sort? A. The Youth's Companion is both a juvenile and an adult journal; it caters to both tastes and probably stands at the very front as a publication for young and old. They claim that the paper is for use for those from fourteen to twenty-one.

196 Q. Again referring expressly to the juvenile matter in the Youth's Companion, how would you say that the fiction in the Tip Top Weekly compares with that? A. Well, I should give the Youth's Companion in literary merit a higher plane, but not morally.

Q. So that the difference between the two would be a mere question of literary taste? A. That is it exactly.

Q. Now, taking the whole field of juvenile fiction from the purely literary point of view, how does the fiction contained in the Tip Top Weekly rank? A. Abreast of the best. If Street & Smith would charge a dollar or a dollar and a half for a gilt binding and choice engravings, among the ultra-critical—that would in my mind give it a standing in the book market.

Q. What is the class of readers who buy and read this publication? A. Well, I should say boys, girls, men and women; I think they include all classes and all ages. Very few men can forget they have been boys. I know that a great many mothers are fond of them and I have found that what pleases a boy is pretty certain to please a sister.

Q. Have you found anything in these publications that would make the reading of them by girls and women inadvisable? A. Not a word. They are clean, pure and elevating.

Q. Have you had any experience with the management of Sunday

School libraries, or the selection of books for them? A. I have, considerable.

197 Q. Can you state how, in point of moral tone, the fiction in the Tip Top Weekly will compare with the books or stories of a juvenile character generally contained in and recognized as proper for Sunday school libraries? A. It is equal to the best and superior to nine-tenths.

Q. You are not connected now with any Sunday School library? A. Not just now. I have been within two or three years.

Q. Suppose I ask you whether from a literary standpoint the Tip Top Weekly is a periodical or a book? A. I think there is no doubt that it is a periodical, the same as the Saturday Evening Post.

Q. Do you know whether the demand for it is a periodical demand or similar to a demand for a book once published at a single stroke and left on the market for sale? A. So far as I know it is a periodical demand; one reads one and is looking next week for the continuation of the same story.

Q. What distinct elements of periodicity or continuity do you find in these stories? A. Well, the main characters and their friends appear in each issue; their adventures and experiences being so changed as to meet the demand of the readers.

Q. Do you know, or can you state any matter or thing not already included in your testimony which is material to the issue in this cause? Or of advantage to either of the parties thereto. A.

198 I cannot think of anything.

Cross-examination.

By Mr. McNAMARA:

Q. Mr. Ellis, you are an author? A. Yes.

Q. You are a publisher? A. No sir.

Q. Never have been? A. Oh, I ventured once or twice in it and got busted—I could say that I am not a publisher and never have been.

Q. Then the answers you gave on direct examination had no reference to the publisher's standpoint? A. No.

Q. Now, you have written several books for boys? A. Yes.

Q. Were they educational stories? A. Some of them.

Q. And some fiction? A. Yes.

Q. Were they what are known now as reference books in the school? A. Similar to them yes.

Q. You have not the fortune or misfortune of being a contributor to the Tip Top Weekly, have you? A. Not the present work. I never wrote for that.

Q. Do you know of any school where the Tip Top Weekly

199 is kept as a reference book for the young? A. I do not.

Q. You say you were connected with some Sunday school at one time? A. Yes sir.

Q. You have since retired? A. Retired.

Q. Do you know whether they had the Tip Top Weekly on file? A. I think that the time that I was connected with the Sunday school, they were not published, it is now a number of years.

POOR COPY

Q. How long ago, may I ask? A. The last Sunday school that I was connected with, was three or four years ago, and that had no library at all. The one that had a library was fifteen or twenty years ago, in Trenton; we had a library, but at that time I assume these were not published.

Q. Do I understand you to say that two or three years ago you had some connection with a Sunday school? A. Yes, in Montclair; they had no books at all.

Q. None at all? A. None at all.

Q. Now, your opinion of the character of the Tip Top Weekly is that it recites manly sports—instances of school life and American boyhood. Does it idealize those conditions? A. Well, I should say yes, to a certain extent; the characters and heroes possess those qualities which are ideal ones for boys; this main character never swears, never drinks, does not even smoke; he never shows disrespect to his parents; is not a brawler; will fight to defend an innocent person. Some of his adventures are sensational, but truth is stranger than fiction and I should say that they do idealize the noble qualities of boyhood.

200

Q. Do they not on the other hand idealize what is impossible of fulfillment by nearly every boy? A. Why, I do not assume that it is impossible for a boy to be truthful, respectful, honest,—live with the Golden Rule. That is what it is. I am not prepared to admit, on that assumption, that it is impossible.

Q. You misconceive my question. It is, if their stories do not idealize what is impossible to the average boy? A. I do not see wherein they do.

Q. Have you read the following stories? Frank Merriwell's College Chum, or the Charm of Cocheta; Dick Merriwell Lion Tamer, or Ate, Queen of the Air; Dick Merriwell's Skill, or The Prince of the Pistol, Dick Merriwell's Joke or Fun with the Jumping Frenchman, Dick Merriwell's Hurdling, or the Star and the Satellites? A. I have read a good many, but I do not recall those that you have named.

Q. Have you read the story of Dick Merriwell, the Boy Lawyer, or how He Won a Million Dollar Fee? A. No.

Q. Do you consider that the commendation you have supplied to the stories would apply also to the ones I have mentioned? A. I presume it is quite probable that among them are some that it would not apply to.

201

Q. Do you consider those stories helpful to the young? A. Yes. On the principle that you ought to hitch your wagon to a lode star—you may not get there, but you may get nearer than by hitching it to a donkey.

Q. The man who wrote that, Emerson,—is not generally read by the young? A. I should think not.

Q. Don't you know he is not? A. Pretty certain.

Q. Nor by the elder? A. No.

Q. They are esoteric, or have a hidden meaning? A. Yes, that is what I call transcendental aspirations—whatever that means.

Q. As a matter of fact, then don't you think that these stories

incite boys to do things that they cannot accomplish? A. Not necessarily.

Q. Well, practically. Do you write stories of that kind? A. I try not to.

Q. Don't they as a rule incite a little opposition to parental authority, or incite desire to become a soldier of fortune; don't all stories of Dick Merriwell's Escapade on the Wall of China, or his murdering the bandits of the west—don't they urge the boys to do some-
202 thing that they cannot possibly accomplish? A. I say that depends on the boy.

Q. Do you know to what extent these stories are read by boys? A. Only in a general way.

Q. In that general way what is the class of boys who read these stories? A. Well, I should say the boys that read them are the ones that should read them—who have not the facilities that the sons of well-to-do persons have. It is like an uncouth father teaching his children; he gathers his poor ragged boys around him and tries to teach them lessons that do not demand ability—and these are read by boys who otherwise would be running the streets and going into saloons and deals with a class that is not reached by the dollar and a half books and the dollar and a quarter books.

Q. The messenger boys, I believe, read these stories. A. Yes.

Q. Now these stories are generally on sale at railroad stations and public places? A. Yes.

Q. As I understand you, you say that if a gilt binding were put on these books and a nice engraving, and a dollar and a half charged for them they would be bought by any class? A. Yes.

Q. Then are these appearances the only difference that you distinguish between these stories and "Three Weeks"? A. These stories are superior.

203 Q. They have better moral tone? A. Yes.

Q. From the standpoint of superiority as a story, how do they compare with the Masquerader? A. They are continuous and the Masquerader is one story complete; you read it and end it and lay it aside.

Q. Have you read the Circle? A. No, I haven't read it.

Q. Have you read Tom Sawyer? A. Yes.

Q. Huckleberry Finn? A. Yes.

Q. Tom Sawyer Abroad? A. I do not think I have read that.

Q. They are all the same figures and heroes are they not? A. Yes.

Q. Separate books, are they not? A. Certainly.

Q. You never were beguiled with the idea that they were magazines? A. Not unless they were issued from week to week, or every month.

Q. So that if they were issued every week or month and had not sold for a dollar and a half, they would be periodicals? A. Yes, a periodical.

Q. That is your idea? A. Webster's also.

204 Q. Do you know the etymology of a periodical? A. Yes.

Q. "Peri" and "odos" is it not. It means in Greek a place

POOR COPY

to stop. That is the etymology of periodical, is it not? A. I cannot tell you; I am very glad to learn it. But if we take the word sophristry, it originally meant correct reasoning, now it means the opposite.

Q. Now, if these stories had been brought out at a regular time and followed regularly—I mean the stories of Huck Finn, and Tom Sawyer and Tom Sawyer Abroad—those three—from your standpoint, they would be considered periodicals? A. That would be hard to say. There are three of these, but if some one published them one a week, I would call them periodicals.

Q. Are you familiar with the Elsie Dinsmore stories? A. I am not. There is no end to them.

Q. Do you know how many books there are in the series? A. No.

Q. As a matter of fact there are over 20 in each series. They are published separately, Elsie's Girlhood, Womanhood, Marriage, Children, Grand-Children and so on; do you consider those books periodicals; they have published twenty or thirty or forty. A. How are they issued?

Q. In book form. A. How often?

205 Q. I cannot tell you that. A. There is the question. To my mind if they were issued week by week, so long as they continued I would call them periodicals, but if they were issued as I am quite certain they were,—months apart, those are not periodicals.

Q. So that the question of time would play a considerable part in your estimation? A. I think so, yes.

Q. But if these books should appear every two or three months and they ran through a series of twenty or thirty, you would call them periodicals? A. Well, I think three months is too long a period.

Q. Do you know how many times a periodical must issue according to law?

Mr. GLASSIE: Objected to as the witness was not asked as to his understanding of the requirements of law, he was asked as to the extent of his understanding of the literary sense of the word.

Mr. MCNAMARA: He can answer the question by saying that he does not know the requirements of law.

WITNESS: That is right.

Q. Your testimony, I believe, as to the character of the magazines was that the magazine as a rule is fitful and uncertain; what do you mean by that, Mr. Ellis? A. Well, where a magazine has to cater to all sorts of tastes, some are objectionable—some of the worst I ever read—then you will come across an item that is classically pure. You don't know. I take lots of them, and I would want to look through them and be sure before I gave one to my

206 children of what he or she was going to read. But if I had a good sturdy boy and wanted him to read a good story I would not hesitate to let him take a Tip Top book.

Q. Now in the magazines you have a mixture, is it not? A. Yes, certainly.

Q. You have none of those features in the Tip Top Weekly? A. I think there is a little in the back part; but not to that extent; it is practically one story running right through.

Q. Do I understand, Mr. Ellis, you have not given any testimony as to the act of 1879, defining the different classes of mail matter? A. No.

Q. Another question occurs to me. You are familiar with Irvings' Sketch Book? A. Yes.

Q. There are many stories contained in that book? A. Yes.

Q. But they are all complete in themselves? A. Yes.

Q. Now, if you published those stories separately would you not have the same sort of a story? A. No; they are like separate books, several small books; this is a continuous story.

Q. So that the fact that Dick Merriwell appears in two or three stories makes it continuous. A. Yes.

207 Q. You are familiar with the writings of Dumas? A. I read a good many, yes.

Q. Do you find the same characters appearing in "Twenty Years After" whom you met in "Three Musketeers"? A. Yes.

Q. Are you familiar with Lytton's story of the Pelhams? A. I read it many years ago, but I do not recall it now.

Q. Do you recall the story of the Devereaux? A. No.

Q. You don't recall that the same character occurred in both books? A. No.

Q. You are familiar with the Leather Stocking Tales? A. Yes.

Q. You are familiar with Louisa Olcott's Little Men and Little Women? A. Yes.

Q. They have considerable vogue? A. Yes.

Q. And the same plot and characters are there? A. Yes.

Q. Such also is true of Edna Lyall? A. Yes.

Q. In Donovan, Golden Days and kindred books? A. Yes.

Q. You wouldn't call those periodicals would you? A. No. Not unless they appeared that way.

208 Redirect examination.

By Mr. Glassie:

Q. If, as a matter of literary selection, one were compelled to put out of the category of decent fiction all stories in which a series of impossible events was dealt with, how much, in your judgment as a man of letters, would you have to exclude from the whole lot of fiction? A. I should say offhand probably three quarters.

Recross examination:

Q. Are you familiar with the Riverside series? A. What do those include?

Q. Byron and Keats and that class. A. Yes, I have gotten most of the poets.

Q. They came out in publications every month? A. Lots of them by Lamb, Tennyson, and so forth?

Q. Yes. Now they appeared coming from the house of publication and were issued regularly and they contained these printed

POOR COPY

publications; would you call those periodicals? A. Well, wasn't there a set of them published?

Q. Yes. A. Well, they had a beginning and an end; they stopped.

EDWARD S. ELLIS.

Sworn & subscribed before me the 31st day of March A. D. 1908.

HERBERT W. KNIGHT,
Notary Public of N. J.

209 EDWARD STRATEMEYER, named in the notice as Edward J. Stratamyer, being produced on behalf of the complainant and duly sworn, testified as follows.

Direct examination.

By Mr. GLASSIE:

Q. Please state your name, Mr. Stratemeyer, in full. A. Edward Stratemeyer.

Q. Your place of residence? A. Newark, New Jersey.

Q. What is the street and number? A. 171 North 7th Street.

Q. You are a non-resident of the District of Columbia? A. I am.

Q. What is your present occupation? A. I am an author and literary agent.

Q. Would you mind stating the titles or indicating briefly the character or nature of the different books you have published or the literary work that you have done? A. I have written about eighty books for boys.

Q. What connection if any did you have with the late Horatio Alger, Jr.? A. I finished up the books that Mr. Alger left unfinished at his death.

Q. Horatio Alger was the author, I believe of a large number of juvenile books or stories? A. Yes, Mr. Alger wrote prob-
210 ably a hundred or more books for boys.

Q. Can you state, Mr. Stratemeyer, how Mr. Alger's books for boys were regarded in the literary world? A. Well, at one time Mr. Alger's works stood in the front rank of juvenile works. Of late years they have been more or less superseded by books that are more up to date.

Q. In other words, their sale is not as great as it was formerly? A. Not the sale of copyrighted, high priced books.

Q. How are they regarded from the standpoint of literary merit and moral tone now? A. The moral tone is unexceptional and the literary merit is on the whole quite good.

Q. Are they to be found in libraries, public or Sunday school, generally throughout the United States? A. To the best of my knowledge they were to be found in a large number of libraries some years past, but they have been superseded by works that are more up to date.

Q. What was the rank, Mr. Stratemeyer, in the world of juvenile fiction, of the works of Oliver Optic? A. "Oliver Optic" during his life was one of the most popular writers of books for boys.

Q. All of these books, I infer from your previous answers have been replaced by newer works and of fresher interest? A. Yes.

Q. Are you acquainted generally with the body of current juvenile fiction? A. I am.

211 Q. I believe that you yourself have contributed to American juvenile fiction as you have already indicated, to a great extent? A. Yes. And I have handled a number of productions of various authors through my literary agency.

Q. Have you read a considerable number of the issues of the Tip Top Weekly? A. I have read about ninety numbers; all of my own selection.

Q. Look at the papers I show you marked Exhibits 3, 5, 7, and 9, Equity 27279 bearing the file mark, "Filed August 8, 1907, J. R. Young Clerk" purporting to be issues of the Tip Top Weekly for July 6, 1907, July 13, 1907, July 20, 1907, July 27, 1907; is the Tip Top Weekly to which you refer the same Tip Top Weekly of which these are copies? A. It is.

Q. Are you acquainted, from your reading of them, with the character and contents of the publication as a whole? A. I am.

Q. Can you say to what this publication is devoted? A. It, as a publication is devoted to the doings primarily of two brothers, Frank Merriwell and Dick Merriwell, and take in their adventures at Boarding school, college, on the athletic field, in camp, out hunting, and on the water, and also occasional trips to foreign countries.

Q. Can you state what is the general character of the stories and the subjects to which they relate? A. So far as I have been

212 able to ascertain the stories are clean, pure, up to date stories of boyhood life. They advocate temperance, proper regard for parents and for teachers; they preach against gambling, against excessive hazing in school, against smoking, and one in particular taught a strong lesson against the use of cocaine.

Q. What sort of character is held up in these stories as the ideal for American youth? A. The ideal is that of an American boy who is manly in the best sense of the term, has a proper regard for the feelings of those around him and who wishes to do what is right under all circumstances.

Q. What effect upon the character of its readers are the stories in the Tip Top Weekly calculated to have as compared with the stories contained in the generally recognized juvenile fiction published in this country? A. The stories in the Tip Top Weekly are calculated to elevate boys and to make them truthful, honest, upright, and in those particulars they are fully the equal of the best of boys' books.

Q. Are you acquainted with the contents and general character of the Youths' Companion? A. Only in a general way.

Q. Can you state from your knowledge of that and from your knowledge of the Tip Top Weekly, how the stories in the Tip Top Weekly compare with the boys' stories in the Youths' Companion? A. From a literary standpoint I should say that the stories in the Youths' Companion were more on an equal level than those

213 of the Tip Top Weekly, the latter being perhaps not so even, but from a purely moral standpoint and from an uplifting standpoint, the Tip Top Weekly stories are as good as any.

Q. How do the stories in the Tip Top Weekly compare in point of literary excellence with the stories in the popular ten and fifteen-cent magazines, for instance? A. My opinion is that the stories in the Tip Top Weekly, or at least a very large proportion of them, are better from a purely literary standpoint than many of the stories in the popular ten and fifteen cent magazines, and from a moral standpoint they are fully as good.

Q. Considering these stories in so far as they deal with adventure and that sort of thing, how do they compare with the general body of juvenile fiction? A. I should say the adventures were of a very similar character. In the Tip Top Weekly, however, the tendency is towards a series of adventures rather than the exploiting of a single adventure in all its parts, which gives a very rapid action and consequently concentrates the interest.

Q. In dealing with the series of adventures is there anything done to keep the interest going from issue to issue? A. This line of stories is to a large extent one story divided into sections, each section being an issue of the Weekly, or occupying an issue of the Weekly. In other words the whole line of stories is a story of the two Merriwell brothers and their companions.

Q. Are these same characters carried forward through successive issues? A. These main characters and their friends appear
214 in all the issues.

Q. Who read these stories, Mr. Stratemeyer? A. Primarily boys, young men, and I have heard that quite a number of girls and quite a number of older folks read them.

Q. To what audience are they primarily addressed? A. Boys and young men.

Q. Now, in dealing with adventures that may in any respect border on the marvellous, is there anything in these stories tending, from a literary or ethical standpoint, to produce an unhealthy attitude of mind in boys and young men? A. In reading over these stories, I have found nothing in them which would be in the least detrimental to either a boy's imagination or his moral susceptibilities, nor have I found anything which would tend to corrupt him in any way.

Q. Have you read Robert Louis Stevenson's Treasure Island? A. I have.

Q. You will recall, of course, in that story that he deals very largely with pirates, mutineers and buried treasure? A. Yes.

Q. Do you find in the Tip Top Weekly, in its stories of adventure, subjects more exciting, or in their nature more out of the ordinary line of human conduct than those that are dealt with in Treasure Island, for instance? A. I have found nothing in the Tip Top Weekly which was more sensational than certain portions of Treasure Island; nothing which was any more out of the ordinary,
215 nothing which was as truly exciting, as the scenes in Treasure Island.

Q. Can you state, Mr. Stratemeyer, from your general acquaintance with Juvenile fiction, whether or not adventures of an exciting nature are or are not a staple subject for treatment? A. Fully ninety-five per cent of the juvenile literature of to-day contains more or

less of adventure and those adventures, if properly treated are not detrimental in any way, in my opinion, to the reader.

Q. Is what you have just said of current juvenile fiction also true of juvenile fiction—of the best? A. It is

Q. Will you state, Mr. Stratameyer, whether you regard the successive issues of the Tip Top Weekly as a book or as a periodical?

Mr. McNAMARA: Objected to. If, it assumes that this witness knew as to whether the Tip Top Weekly is a periodical in law. If the witness be shown to be qualified it might have a bearing on this question.

Mr. GLASSIE: By the question I mean whether it is a book or a periodical in the ordinary sense of those words.

A. I regard the Tip Top Weekly as a periodical the same as I would the regular magazines. It contains a long story and several short articles, and in this regard is similar to Lippincott's Magazine.

Q. Can you state from your knowledge of this publication and its circulation whether or not the demand for it is a periodical
216 demand? A. From my own knowledge I should say that the demand for this was a steady weekly demand, the people buying one issue looking generally for the next.

Cross-examination.

By Mr. McNAMARA:

Q. Mr. Stratameyer, you write under a pen name? A. I do sometimes.

Q. What is it, please? A. Arthur M. Winfield.

Q. Who publishes your books? A. The majority of my books are published by Lothrop, Lee & Shepard Co., of Boston. Those are under my name.

Q. Have you any books appearing recently? A. I have three books.

Q. This is your profession? A. It is.

Q. You have been engaged writing books for some time? A. About fifteen years, books. Previous to that, serial stories, for ten years before that.

Q. So your experience covers about twenty-five years? A. Yes.

Q. During any or all of that time did you write for the Tip Top Weekly? A. I did not.

217 Q. Do you know anybody who did? A. Well, years ago, when the Tip Top Weekly was first started, I knew a gentleman who was supposed to write those books; I haven't seen or heard of that man for probably five or six years.

Q. Who was he? A. He was a man named Patten.

Q. Where does he live? A. I don't know.

Q. Where did he live when you knew him? A. I think he was staying in New York.

Q. Was Patten the name he was writing under or was Patten——. A. Interrupting.) No; Patten was his own name.

Q. What name did he write under? A. Standish.

Q. Did you ever know anybody else who wrote for these papers? A. Not to my recollection.

Q. Practically it is a one man affair, is it not? A. I don't know who has been writing these stories for five or six years.

Q. You are in professional literature and writing juvenile stories? A. Yes.

Q. You have a general knowledge of matters within that province? A. Yes sir.

Q. Then you know nothing at all about this Tip Top
218 Weekly? A. No sir, that is in so far as publishing it is concerned.

Q. Then what do you mean by testifying here to the demand for this publication? A. I know there is a large demand.

Q. How do you know that? A. I see it being sold.

Q. Do you stand around and watch it? A. No, but I have seen them sold.

Q. They tell you they make sales? A. Yes, they tell me they make sales and I have seen them sell it.

Q. So that your knowledge is only gathered from what you have observed when you were standing around a news stand where the Tip Top Weekly was on display? A. Not all together.

Q. Well, now, what other opportunity—what other source was there? A. Well, I have met a number of boys who read the Tip Top Weekly and who buy it.

Q. And you took their word for it? A. I took their word because I have heard them speak of the stories that are in it.

Q. Have you read these books yourself? A. I have read a number of them yes sir.

Q. Some ninety, I believe? A. Some ninety, yes sir.

Q. You are familiar with the titles that appear upon the
219 back of one of these issues? A. In a general way, yes.

Q. Well, have you read all these? A. The numbers that I read were part of the first numbers, and then some that have been published within the last four or five months—three months—last three months.

Q. Now you consider—— A. (Interrupting.) Of course I wish to qualify that statement by saying that I did not read ninety books word for word but I have read a number of them through and the others I have read parts of.

Q. Well, you have read them enough to get an idea? A. Yes.

Q. From your knowledge then thus gained you consider the influence of those books beneficial? A. Beneficial rather than detrimental, yes.

Q. You consider them as beneficial because they tell of the exploits of boys in China, exploits of boys taming lions, holding up express trains, encounters with bandits, and of tricking the shrewd foxes in Wall Street, and heading bands or going on the stage and barn-storming?

Mr. GLASSIE: I want to object to so much of the question as assumes that any story of this series deals with boys holding up trains.

Mr. MCNAMARA: I withdraw that. I might say that I am handicapped by not having here more of the exhibits, as I had in the last

session. They have the titles on the backs, and I am sure of those I named, with the exception of the holding up of the express train.

220 A. Well, in answer to that, I would say that I cannot find any objection to a boy reading of adventures in China.

Q. (Question read.) Of Dick Merriwell's skill or The Prince of the Pistol, the lost Senorita; Frank Merriwell's Talisman or the Charm of Cocheta, or Dick Merriwell's Joke or fun with the jumping Frenchman, or Dick Merriwell's Hurdling or the star and the satellites, or Dick Merriwell as a boy lawyer, or how he won a million-dollar fee? A. I see no objection to a story of lion taming if properly told, because the taming of animals is a very interesting subject, and a very beneficial subject.

Q. For a man who intended to follow a circus, I suppose? A. I never do, but I like to read about it.

Q. Is there anything beneficial in it for a boy who intends to be a useful man? A. There might be. I have found nothing in those stories in which the heroes hold up express trains. As regards bandits, that would depend largely on how the story was told and what the plot referred to. In the west and in the south it has been necessary on more than one occasion for people of good moral standing to hold up bandits if they could. Regarding the tricking of the shrewd foxes of Wall Street, that is a new thing to me.

Q. Can you not give any answer to that? A. No more than what I have just said. As regards leading bands, I consider some of our best young people are good musicians and have a right to

221 show their ability and a story on those lines is not detrimental. For the same reason some persons have no objection to stage life, although I personally might have. Marksmanship is also beneficial both to young and old.

Q. In the militia or regular army? A. I have heard the colonel of a regiment say that he always liked a boy to shoot. About the story of Frank Merriwell's Talisman—I didn't read it.

Q. Have you read the others you have talked about? A. I have read some of these; the Dick Merriwell and Frank Merriwell stories contain scenes similar to each other. The titles I do not recall.

Mr. GLASSIE: I object, because the witness was directed to the titles of subjects contained in these stories and the question was whether the subjects were properly treated or beneficial.

Mr. MCNAMARA: The witness has not seemed to hesitate because he had not read them.

WITNESS: I cannot give an opinion on something I do not understand.

Q. Would you say that a youth without your experience would understand this better than you? A. I say I do not know what you refer to by the simple title of this story.

Q. You cannot say from the caption whether it would be beneficial or not? A. I cannot say, from the title. I do not recall that story by its title. Nor do I remember Frank Merriwell's Joke, or

Fun with the jumping Frenchman. In regard to hurdling
222 I would say that I remember reading one story in which there was hurdling and that was a good story from every point of view.

Q. Was that this story? A. That, I cannot say.

Q. What do you know about this story? A. That I cannot say.

Q. You don't know? A. I cannot say whether I saw the story or not. I know nothing about the story of Dick Merriwell as a lawyer.

Q. Now, Mr. Stratameyer, you say that these books instill a regard for parents and teacher and tell clean, pure, up-to-date stories of boyhood life; in giving that view, you of course have been unable to take into consideration these different fanciful stories whose titles I have just read to you and which you say you have——

A. (Interrupting.) There are, if I remember rightly, over six hundred numbers of this library and, as I have stated, I have only read or looked over critically about ninety numbers, so there are a great many of which I know nothing.

Q. So your opinion is apt to be modified considerably is it not, after you have read some of the other stories? A. Not very materially, because I picked out those that I did read and looked over them myself.

Q. Have you any knowledge whatever of these stories whose titles I have just read to you? A. No.

223 Q. Then do you give this criticism to the series as a whole? A. Yes.

Q. Did you read any in these ninety odd books with names similar to those I have read to you? A. They are all called Dick Merriwell or Frank Merriwell.

Q. I know; but as to the specific title of the story? A. The specific title I cannot state.

Q. So that you have no strong recollection of any specific story you have read? A. I have a general recollection of all the stories.

Q. That is the general criticism you have given? A. Yes.

Q. And among the stories which you have read—— A. (Interrupting.) There have been stories similar to them which I have read. Not having read these I cannot say.

Q. Now, if these stories were of unusual bearing, or dealt with enterprises wherein a boy should not be engaged; would that modify your opinion? A. If those were not up to the standard of what I have read, they would certainly modify my opinion.

Q. So that in the absence of knowledge of these other stories your opinion must be modified? A. I did not say it would be modified.

Q. Only apt to be modified? A. It might be modified.

224 Mr. McNAMARA: Now, without waiving objection, as to whether he has testified it is a periodical and not a book I want to ask if you consider this Tip Top publication the same as an ordinary magazine.

WITNESS: I would say similar.

Q. Generally? A. I certainly consider it similar to weekly publications.

Q. In your testimony you used the words "the same as a regular magazine; do you differentiate the Tip Top Weekly from a regular magazine? A. I should say, considering its contents, I would not consider it different from some magazines, particularly Lippincott's magazine, because they contain, as the Lippincott does one long story and some other stories.

Q. A good many other stories? A. Some.

Q. Does "Lippincotts" have one long story and then two covers? A. The long story makes up the principal portion of the magazine.

Q. There is a long story in the Smart Set? A. Yes.

Q. A French story in Smart Set? A. I am not familiar with the Smart Set.

Q. The mere occurrence of a French story every month in a magazine——

Mr. GLASSIE (interrupting): I want to ask counsel whether this question is based on the assumption that the publication of
225 one other story or two other stories in a publication, the substantial contents of which is one story, would make that publication a magazine.

Mr. MCNAMARA: Counsel is not on the stand and this question is predicated on witness' statements that he considers this the same as a regular magazine. I am trying to find out what is a regular magazine.

Q. I will explain myself. You said that Lippincott's had one long story; now it is a fact that Lippincott had a long story every month, making it appear to you the same as Tip Top Weekly? A. In so far as that similarity exists.

Q. Can you find any other distinction between Lippincott's and the Tip Top Weekly. A. Yes, the Tip Top Weekly is a general publication and the Lippincott as a publication——

Q. Is the Lippincott what you term a regular magazine? A. It is.

Q. Is the Tip Top Weekly what you term a regular magazine? A. No; I should say a weekly publication.

Q. So the distinction was the weeks and the months? A. In regard to the time, yes.

Q. Tell me everything you meant when you said it was a regular magazine? A. In so far as it was published at stated intervals.

Q. I understood you to say that this series was practically
226 one large story divided into a number of small stories, and the same two men, their associates and friends appear in all, is that correct? A. That is right.

Q. And on that account you say it is in reality a periodical. Is that correct? A. On that account the Tip Top Weekly is a periodical?

Q. Yes. A. Not all together on that account but because these stories are connected and are looked for from week to week by the readers of this periodical; and the fact that this periodical is published at certain stated intervals.

Q. Have you read the Elsie Dinsmore series? A. I have not read them but I know of them.

Q. Do you know of Mrs. Finlay's other publication, the Mildred series? A. Yes.

Q. And they run through a number of books? A. Probably about fifty.

Q. The same characters with the proper additions and subtractions of births and deaths appear in all do they not? A. I believe so.

Q. Have you read Frank Norris' series of the Pit, and the Octopus? A. I read the Pit.

Q. Did you read his later books, the Octopus? A. No.

Q. Do you know that the same subjects appear in all?

227 A. No.

Q. Have you read Andrew Lang's Blue Fairy Book? A. Yes.

Q. And the other publications, the Green Fairy Book? A. Yes.

Q. Have you read Louisa Olcott's stories? A. No.

Q. Do you know without having read them, from a general standpoint—— A. (Interupting). I know of them.

Q. (Continuing). —that the same characters appear in them as in Little Men and Little Women. A. Yes.

Q. You have read Sherlock Holmes; the Sign of the Four? A. Yes.

Q. The Return of Sherlock Holmes? A. Yes.

Q. And the same characters run through all? A. Even killing them and reviving them.

Q. Have you read Mark Twain's Tom Sawyer and Huck- Finn? A. Yes.

Q. Tom Sawyer abroad? A. Partly.

Q. The same Tom Sawyer, is it not? A. I believe so.

Q. No one doubts it. By the same author? A. Well, he was not the same Tom Sawyer in flavor.

228 Q. Now, have we not in these books cases of where the subsequent stories are the continuation of the exploits of the characters whom we met in the first book? A. To a very large extent, yes.

Q. And we have the same happening in Tip Top Weekly where Dick Merriwell's brother has appeared in Tip Top books—a physical instructor—that is an incident of the story is it not? A. That is an incident of the story.

Q. Yes. A. Yes, it is necessary to bring in new characters and to change the background.

Q. Yes, it is an entire story around the same central figure. A. Well, there is a distinction between the stories such as Frank Merriwell stories and such stories as Elsie Dinsmore and Tom Sawyer in this respect: that the Merriwell stories are more closely knit together than any of the others you have mentioned.

Q. They sell at cheaper prices. A. Cheap prices?

Q. Not bound in cloth. A. In paper.

Q. Paper? A. Yes.

Redirect examination:

Q. Mr. Stratemeyer, Mr. McNamara has asked you whether the subjects of certain stories, the titles of which he read to you,
229 were in your opinion beneficial rather than detrimental; among them was Dick Merriwell's Adventure in China—that is as near as I can get at it. Are you aware, and were you aware, when the question was asked you, that Jules Verne had written a book known as the Tribulations of a Chinaman, consisting of adventures in China? A. Yes.

Q. Are the works of Jules Verne recognized as standard juvenile fiction? A. Very largely so.

Q. Among the other titles concerning which you were interrogated was "Dick Merriwell's Skill or the Prince of the Pistol;" are you aware of the fact that the President of the United States, in a message to Congress has recommended and urged the establishment of marksmanship teaching throughout the entire school system of this country?

Mr. McNamara: I object to your question as he has no knowledge of what that story might be, that the witness has no knowledge of this particular story, nor what story of Verne's you meant.

A. I have no knowledge of that particular recommendation but I have a knowledge of the President's books on hunting in the West—camping and roughing, and in those he advocates pistol practice, gun practice and marksmanship as being a very excellent thing for all boys.

Q. Among the titles Mr. McNamara asked you about was Dick Merriwell's Joke or Fun with the Jumping Frenchman; are you aware that one of Mark Twain's most famous stories is the
230 Jumping Frog of Calaveras County? A. I am and it is a very good story, indeed, one of his best.

Q. Do you find anything more beneficial in dealing with a joke about a jumping frog than you do in a joke about a jumping Frenchman, as a subject for literary treatment? A. I should think one would be as good as the other if it was properly treated.

Q. Mr. McNamara also asked you about some story in this publication dealing with barnstorming or acting and asked you whether the subject of a boy's doing that sort of thing was beneficial. I will ask you whether or not you are acquainted with the fact that in the University of Pennsylvania there is a society known as the Mask & Wig Club, a purpose of which is to enable the students at that university to develop their histrionic ability, and whether this club annually appears in the chief cities of the Atlantic Seaboard and presents on the stages of theatres, dramatic plays?

Mr. McNamara: I object to that question on the ground that it assumes the purposes of mask and wig club, to be what neither the instructors nor the students have put upon this organization. No more does this organization exist for the development of histrionic abilities of the participants in the plays than do the football and baseball teams exist for the purpose of making professional players

POOR COPY

of the members of these two bodies; they are simply amusements adopted by the students themselves.

A. I am aware that there exists a club such as you have mentioned and that they give plays in different places, and I am also aware that similar clubs exist in other colleges and universi-
231 ties and that they also give plays at different times.

Q. Are you not aware that there is a club in the University of Princeton in this state, known, I believe, as the Triangle, which exists for a similar purpose?

Mr. McNAMARA: Same objection.

A. I am not aware that there is such an organization at Princeton University.

Q. Is it not true, Mr. Stratameyer, that the organization of a theatrical company and the going upon the public stage of theatrical companies, is regarded as legitimate and permissible in college life? A. I think so. If not, I do not see why it isn't stopped. I have never heard of any objection being raised against it.

Mr. McNAMARA: I think that ought to go out—with this witness—unless he is in some way connected with the institutions.

Q. You were also asked about stories of bandits; are you aware that one of Cooper's most celebrated books deals with the subject of pirates? A. I am.

Q. Are you aware that Sir Walter Scott wrote a novel the title of which was "The Pirates"? A. Yes.

Q. Do you find in the choice of the subject, when that subject happens to be one relating to piracy, sport, theatrical enterprises, any test of the beneficial character of any literature whatsoever, or
232 do you find it in the treatment? A. My opinion is, broadly speaking, that it depends very largely on how the subject is treated. A very good subject can be ruined in treatment, and a poor subject can be exalted.

Q. Then what effect upon your opinion of the character of the Tip Top Weekly, based on your critical study of the copies mentioned by you, would be made by reciting any number of titles, the subjects of which appear to relate to China, Jumping Frenchman, Hurdling, marksmanship, theatricals or subjects of a kindred character? A. I would simply repeat as I said before, that it would depend entirely upon the handling of those subjects.

Q. As a literary man, can you say whether that is or is not true of all literature? A. True of all literature.

Q. In reading these issues of the Tip Top Weekly did you do so by selecting the issues themselves, without suggestion? A. I picked out what numbers I wished, myself.

Q. With respect to the question of periodical or book, when you compared the Tip Top Weekly with Lippincott's Magazine, were you aware of the fact that the story or novel which forms the substantial contents of Lippincott's Magazine was a complete novel, having no connection with the one published in the preceding issue, and no connection with the one published in the succeeding issue.

A. I was aware of the fact that the novels in Lippincott's Magazine are, usually speaking, disconnected.

233 Q. Are you aware, as a matter of current literary history, that certain regular magazines are made up of stories all or in part absolutely complete in themselves and having no connection with any story printed in any preceding number and designed to have no connection with any story printed in any succeeding number? A. I am acquainted with such magazines, yes.

Recross examination:

Q. You stated, Mr. Stratemeyer, that you made an examination of different numbers of Tip Top Weekly; when did you make that examination? A. Some of those—a large number of them—I examined in the last three months, and others I read some years ago.

Q. Did you make this examination for the purpose of giving this testimony? A. The examination of the numbers that I have read within the last two or three months was made with a view to this examination.

Q. And at the request of—— A. Mr. Smith.

Q. Mr. Smith? A. Yes.

Q. Did you have before you the entire publications of Tip Top Weekly? A. No, I asked for certain ones.

Q. How did you know the numbers then? A. I under-

234 stand the numbers run to six hundred or more.

Q. So you picked them out liberally? A. Yes; and I missed four out of six hundred; in picking out those that I selected I evidently missed the four that you have mentioned.

Q. Are you prepared to say that you have read any of those that I mentioned?

Mr. GLASSIE: I object to that question; the witness has testified to what he has read.

A. I said I could not remember having read those numbers with the titles you gave.

Q. Then your statement is that you do not remember reading any of those I mentioned? A. You have not mentioned more than four.

Q. You see Lippincott's pretty frequently, do you not? A. I do.

Q. Is that regular story to which you have referred written always by the same person? A. No, I should think not.

Q. Quite a lot of the regular magazines has a long story? A. Yes.

Q. Are they written by the same person? A. I don't know.

EDWARD STRATEMEYER.

Sworn & subscribed before me this 31st day of March A. D. 1908.

HERBERT W. KNIGHT.
Notary Public, of N. J.

235 JOHN C. DANA, being produced on behalf of the defendant and duly sworn, testified as follows.

Q. Mr. Dana, will you state your full name? A. John Cotton Dana.

Q. You are of lawful age? A. Yes.

Q. What is your profession, or occupation? A. I am librarian of a public library.

Q. What is your acquaintance generally with the literature of this country? A. I have been librarian for nearly nineteen years in three cities and have had occasion to read about a great many books and to buy a great many as the result of my reading.

Q. As a consequence of your professional employment have you made yourself familiar with the general body of juvenile fiction published in the United States? A. Quite fairly so.

Q. Are you acquainted with what are regarded as standards? A. Yes.

Q. Are you acquainted with the Tip Top Weekly published by Street & Smith in New York? A. Yes.

Q. I show you papers marked exhibits 5, 7 and 9, purporting to be copies of the Tip Top Weekly and marked as exhibits in Equity 27279, and ask you whether they are issues of the periodical

236 to which you refer? A. Yes, they are.

Q. Are you acquainted in a general way with the nature of their contents? A. Yes.

Q. Can you state, to what, if anything those publications are devoted? A. They are devoted to stories for young people.

Q. Now, will you state, Mr. Dana, if you can, what is the general character, in respect to moral tone, of the stories contained in that publication? A. The moral tone, from the view point of the strict moralist, is what would be called good, in that, so far as I have looked at them myself, or had others look at them whose opinion I wished to get, all of them make virtue in the end triumphant and vice meet its just deserts. As far as my acquaintance with them goes, they do not seem to teach anything out the way in regard to the important moral questions.

Q. What ideas in regard to life and conduct do the stories impart, generally speaking? A. Like all stories of adventure, whether for old or young, they bring together in one short interval a number of exciting events such as would not ordinarily in so short a time happen to any one individual. They are built up just exactly as all ordinary fiction is built up, with a view to making a striking story with a beginning, then a series of events leading to a crisis, and an appropriate ending. They thus follow the general rule of pretty much all fiction and especially fiction of adventure.

237 Q. From the standpoint of habits, such as the liquor habit or tobacco habit, do you find anything in these stories of a demoralizing character? A. I do not recall that I have.

Q. Is it a fact, Mr. Dana that juvenile fiction, both current and that which has found a place in literature generally, is largely made up of stories of adventure? A. That is right.

Q. Would Robert Louis Stevenson's "Treasure Island" fall under that head? A. Yes, indeed.

Q. Would the stories of Cooper? A. Yes.

Q. Is it true generally of those which are recognized as by standard authors? A. Yes, if you wish, I could name some.

Q. I would be glad to have you. A. Horatio Alger, Ballantine, W. H. G. Kingston—their stories are full of adventure; that is the one thing for which those men are well known.

Q. Is there anything so far as you have been able to observe in these stories which could be said to have a demoralizing tendency on the youthful reader? A. I wouldn't think so. If so, then the same tendency would be found in a great deal of current juvenile literature. If I might say just a little more, I would say this, that in my observation and study as to the effect on young people of reading
exciting stories,—beginning with things as exciting as fairy
238 tales and going on to the Arabian Nights and Robinson Crusoe and current stories that boys and girls generally read,—as to whether or not the reading of those stories in quantity is injurious to children I think I can speak within the mark when I say that nobody knows. My inquiries in regard to this particular magazine, and others like it, lead me to conclude that it is not distinguishingly injurious as compared with others of a like character.

Q. You are speaking now of this particular publication? A. Yes.

Q. Is it not true, Mr. Dana, that literature of the story telling variety designed to please the youthful mind is very largely of an exciting character? A. Undoubtedly so. I have frequently had occasion to call attention—in discussing the possible harm to young people of exciting stories—to the extremely adventurous and exciting character of classic books like the Iliad, and stories from mythology in general, Greek, Roman, Norse &c. The same thing has been noted by others, of course. The fact is, many of the stories that children are urged to read because they are thought to be educational and improving, are full of impossible adventures and often do not pay any attention whatever to the moral lesson they may convey.

Cross-examined.

By Mr. McNAMARA:

Q. You are a librarian at the present time? A. Yes.

Q. Where? A. Newark.

239 Q. And you have been librarian in two other places. A. Yes.

Q. Where? A. Springfield, Mass. and Denver, Col.

Q. Have you on file the Tip Top Weekly in your library? A. No.

Q. Had you at Springfield? A. No.

Q. Or Denver? A. No.

Q. You had magazines, did you not in those places? A. Oh yes.

Q. Did I understand you to say the moral tone of the Tip Top Weekly from the standpoint of the strict moralist is good? A. That is what I have gathered.

Q. Have you read them pretty extensively? A. Not extensively, no, sir.

Q. Who is the leading character? A. His name is Merriwell, I sometimes get it mixed with Merryweather.

Q. He later has some other member of his family in the series? A. I believe he has.

Q. From my understanding of your testimony you say that the tone of these publications is largely adventurous? A. Yes.

240 Q. Would you say that it is fiction relating to college life? A. You mean to say is it possible for college life to be as adventurous as this is?

Q. As a general rule, would you say that this is the fiction of college life? A. Not as college life is lived by most students.

Q. Is it your idea of the way college life should be lived? A. No I wouldn't think so, any more than I would think the life of anyone should be such as novels often portray it.

Q. Then I understand this is not an exact portrayal of college life? A. No, I do not think it is.

Q. Then do you think that this series of stories are accurate statements of a collection of incidents in the careers of youths at college? A. Do you mean to say *in* college?

Q. Let us say first, *in* college; as a matter of fact has this publication anything to do with the career of a boy in college? A. Not very much, except that the college life serves as a thread on which to hang the stories.

Q. Now, has it any necessary connection with the college boy, outside of school? A. Well, I suppose I could answer that best, if I understand your question, by taking what I assume to be the author's point of view. He assumes that most boys would be more interested in the adventures of other boys, if the lat-

241 ter were in part college students.

Q. Could you justly characterize this series of stories as stories of college life or incidents in the life of a boy at college? A. You mean to say that if they are not incidents of a boy in college, then they are traveling under a false name, and they are assumed to be that which they are not and should not be permitted. I would say that the assumption that they take on is so plainly one that it need deceive nobody, not even a boy.

Q. So that they could do no harm because the deception is so apparent? A. From my looking them over, I should think that the suggestion that they would convey to the ordinary boy that college boys live after this style, is one that would not be accepted by the average boy who reads them.

Q. So in characterizing several of these works, such as "Dick Merriwell at College" as a college story you take it that the college is introduced as something on which to hang the story? A. To a considerable extent.

Q. As a matter of fact, has this series anything to do with student or any kind of scholastic life—is it not an adventure story, pure and simple? A. Well, it might be that—an adventure story, and still have this thing we were speaking of for a college background.

Q. Now, we agree that the books, from a moral standpoint,
242 are not to be condemned, but isn't it also true that the books have an atmosphere of discontent with existing conditions that is generally injurious to young boys? Has the reading of the books impressed you to that extent? A. Not seriously, no. I shall have to answer as I did before—that as to whether these or any similar books are so extreme in incident and adventure as to be injurious to boys,—I cannot tell. I conclude that these things are taken as are fairy tales, and as are the myths of Greece and Rome.

Q. In other words, he does not seriously consider whether they are true or not? A. He does not seriously consider whether they ever happened or not.

Q. Now, take the old stories of Greece and Rome, some of the mythological ones,—some of the miracle stories of the middle ages, take the miracle plays after the Renaissance, put those in readable form, published in the way that the Tip Top Weekly is published, and you would have a story very interesting very inspiring, not at all injurious, but very improbable. So that, about what you have in the story of Dick Merriwell when he tames a lion, or, as a lawyer wins a million dollar fee;—haven't you got about the same line of reading matter in those articles I have mentioned, as you have when you read Dick Merriwell? A. Well, there is a difference. Let me explain. There are many incidents, some real and some fanciful, which have been used by story-tellers for many centuries. A certain number of these have been very beautifully told, or told in a dramatic or attractive way, or have had to do with some
243 famous and much loved or much admired person, or have been closely connected with religion or patriotism. For these or other reason these particular incidents have become a part of the racial inheritance. They are of common knowledge. They are part of the cement of kindred thoughts which knit people together by making them alike in thought and feeling. These incidents all children should be familiar with. That they may or may not be strictly moral or convey directly a proper lesson is of little consequence.

In addition to these ancient and classical "adventure stories" which every child should know, we have the "adventure stories" produced by men of imagination and skill in writing of to-day. These may be well told, even beautifully and dramatically told,—but they are not so important in many ways for young and old, as are the older tales. Among these latter-day tales of the hour comes stories of a kind we are considering. That these latter are markedly harmful in any way no one can say. My opinion is that they are not, and that in fact their atmosphere is often decidedly above that of the shop and street corner on which boys spend much of their time.

Q. Now you would not seriously consider that the fairy tales, mythologies and folk lore are periodicals or magazines would you? A. Well they might be printed in a magazine.

Q. You don't find them printed in magazines? A. No.

Q. From the standpoint of a book man wouldn't you call
244 these books rather than magazines? A. Well you would have to define a magazine for me first.

Q. Using the word magazine in the current sense and book in the current sense would you classify them rather as books than as magazines? A. It would depend on how they were printed.

Q. Yes, it would depend on how they were printed. In your library you don't classify them under the magazine division? A. No.

Q. Under the book division? A. Yes.

Q. So it comes down to the question of the printing or the binding of the story they get up—put up in magazine form? A. Yes, one might get a book in the form of the Tip Top Weekly and have in it the works of the great classic writers. Or, one might get a modern writer to rewrite the Iliad and Odyssey and publish the successive incidents in a magazine.

Q. That wouldn't make a distinct story of each one? A. In each magazine the special incident might be quite independent

Q. So that it would largely come down to a question of printing and binding? A. Yes.

Q. Now I suppose the form in which it was put and the matter that might go with it—— A. (Interrupting) Well, that is
245 right.—the form and the matter which might go with it.

Q. Yes, that is right, isn't it? A. I presume so. But, I don't mean that the Iliad, if printed in the typographic form of the Tip Top Weekly,—a hash of the Iliad in each separate part, would make a thing like the Tip Top Weekly by any means.

Q. You spoke of the works of Optic, Ballantine etc. A. Those are generally stories of adventure. They are similar in general character to the Tip Top Weekly.

Q. Different because they are put up in book form? A. That does not make the story different.

Q. Well, the substance of the story is the same as the story in these publications? A. Yes, it is a story of adventure.

Q. It is similar to the story in these? A. Yes in the subject matter as far as the main story is concerned.

Q. You have never been in the publishing business? A. No sir.

Q. You are not familiar at all with the law? A. No.

Redirect examination.

By Mr. GLASSIE:

Q. When you were describing the similarity between the ancient hero tale and the hero tale as it may be connected with modern life, you were dealing with the substance of the thing and not with reference to any particular form it might be put into?
246 A. Yes.

Q. Do you recall that Charles Lamb rewrote the story of the Odyssey and called it the Adventures of Ulysses? A. Yes.

Q. Do you remember whether or not he published that in an English magazine to which he was a contributor? A. I do not remember that.

Q. In Hawthorne's Twice Told Tales, there was nothing in the nature of those stories which could have prevented them being published in the current magazine of that day? A. Not at all.

Q. Now you have spoken of stories of adventure and your remarks have been addressed to them. I want to draw your attention to the fact, as appears from the publication itself, that a considerable, quite a large portion of these stories deal with sports—baseball, football, skating, swimming, boating, etc. A. Yes.

Q. Would what you have said about the story as dealing with extraneous adventures or adventures foreign to college life, apply to the numbers in which these same heroes occur in connection with stories of baseball, football and the like? A. You mean what I said in regard to the relationship of the story to college life?

Q. Yes. A. It is a fact, that such a story is largely concerned with what are commonly regarded as college sports.

Q. Yes. In other words, to come to the point my friend
247 Mr. McNamara has directed his criticism to, stories of adventure not been strictly connected with college life. Now, so far as these stories deal with the sports of college life they may be properly called college stories? A. That is correct. I had in mind one of the last I looked over. Some of these as I recall them, have little or no college stories.

Q. Exactly what proportion deal with college stories and what with adventures outside of college you are not prepared to say? A. No.

Recross-examination.

Q. Mr. Dana, what branch of college life do the stories of "Frank Merriwell's Quick Shot, or the lost Senorita" or "Dick Merriwell the Lion Tamer, or Ate Queen of the Air" concern themselves with? A. I don't know; he might have gone down to Coney Island for those adventures.

Q. Well, we will leave him at Coney Island. That's all.

J. C. DANA.

Sworn & subscribed before me this 31st day of March, A. D. 1908.

HERBERT W. KNIGHT,
Notary Public of N. J.

It was stipulated and agreed between counsel for the respective parties that the testimony taken in this case may be used on
248 the hearing of the case now pending in the Supreme Court of the District of Columbia in which Frank Tousey, publisher, a corporation, is the plaintiff, and George von L. Meyer, Postmaster General of the United States, is defendant, being Equity No. 27208 so far as the same be relevant to the issues therein, and subject to the same objection and exception as hereinbefore noted.

HERBERT W. KNIGHT,
Notary Public of N. J.

249 *Testimony on Behalf of Defendant.*

Filed March 31, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

STREET & SMITH et al., Complainants,
vs.
VON L. MEYER, Postmaster General, Defendant.

WASHINGTON, D. C., TUESDAY, *July* 21, 1908—
3 o'clock p. m.

Met pursuant to notice at Room 527 Post Office Department, Washington, D. C.

Present on behalf of the complainants, Henry H. Glassie.

Present on behalf of the defendant, Stuart McNamara, and the Examiner, Frank D. Blackistone.

Whereupon: HARWOOD MUMFORD BACON, a witness called by and on the behalf of the defendant, having been first duly sworn, testified as follows:

By Mr. MCNAMARA:

Q. Mr. Bacon, what is your official position in the Post Office Department? A. Superintendent of the Division of Classification, Office of the Third Assistant Postmaster General.

Q. Did you occupy that position during the month of June, 1907? A. I did.

250 Q. Your office is in this building? A. Yes sir; Room 303-5.

Q. What floor? A. Third floor.

Q. With respect to the office of the Third Assistant Postmaster General, state where your office is? A. Two floors below.

Q. How long have you been in the Post Office Department? A. Eight or nine years. I have been in the Postal Service about seventeen years.

Q. Are you familiar with the rule found on page 31, Par. 8, Section 19, which reads as follows: "The Division of Classification of mail matter, under the supervision of a Chief of Division, is charged with the consideration of all questions relating to the classification of matters admissible to the mails, intended or deposited for mailing, including the determination of the admissibility of publications to the second class of mail matter and their right to continue therein; the use of penalty envelopes and the franking privilege; the supervision of the collection of postage; the examination of Postmasters' statements of second class postage collected, and keeping the necessary records connected therewith"? A. I am.

Q. That is in the rules and regulations of the Post Office Department for 1902? A. Yes, sir.

Q. Was that rule in force in June 1907? A. It was.

251 Mr. McNAMARA: We offer that in evidence, without, I understand, the objection of the other side.

Mr. GLASSIE: I object to the offer as irrelevant and immaterial, upon the ground that no regulation of the Post Office Department can effect the Statutory hearing provided for by law, or operate to delegate any duty cast upon the Postmaster General or the Third Assistant Postmaster General, or any other person. As to the competency of the regulations, I make no objection and am willing to stipulate that the Postal Laws and regulations may be considered in evidence and referred to by either party at any stage of this case.

Q. Under that regulation, which we have read, have you, as Chief of the Division of Classification, held hearings respecting the admission and continuance of matters in the second class mail? A. Very frequently; yes, sir.

Q. Do you know Mr. William H. Heines, representing Street & Smith, of New York? A. A gentleman of that name called on me.

Q. When did he call on you? A. About June 11.

Q. What year? A. 1907.

Q. He called on you at your office, I suppose? A. Yes, sir.

Q. Now, I will ask you to look at this card and see if you
252 can identify it? A. Yes, sir.

Q. What is it, please? A. A card of William H. Heines, representing Street & Smith, of New York, bearing the endorsement of the Third Assistant Postmaster General, "Mr. Bacon, A. L. L.".

Q. What does "A. L. L." stand for? A. A. L. Lawshe.

Q. Are you familiar with that handwriting? A. Yes, sir.

Q. You think it is the handwriting of Mr. Lawshe? A. Yes, sir; it is. Bearing on the back, the date it was handed to me.

Q. What date is that? A. June 11, 1907.

Q. By whom was that card handed you? A. Mr. Heines.

Q. What did Mr. Heines have to say to you, if anything, on that occasion? A. Nothing material, except to hand me,—nothing material, so far as the statement is concerned,—he merely handed me briefs in the cases on which the hearing was to be had, and departed.

Q. Now, in what cases were hearings to be had? A. I will have to go to the record for that.

Q. Well, we all know. I simply wanted to get it formally. Do you recollect whether it was in the case of Street and Smith and the Tousey Publishing Co.? A. Yes, sir.

253 Q. And it involved publications known as "Work and Win" and "Tip Top Weekly" and some others of the same class? A. Yes, sir.

Q. I will ask you if you recognize this pamphlet? A. Yes, sir; that was one of the pamphlets handed me.

Q. By Mr. Heines? A. By Mr. Heines.

Q. That pamphlet has relation to "Work and Win." One of

the other pamphlets handed you was in relation to Tip Top Weekly? A. The several publications were each covered, to the best of my recollection.

Q. Prior to his visit, you stated a citation had been issued to the firms of Street & Smith and The Frank Tousey Co. That citation is the one that was set out as exhibit in the complainant's bill? A. Yes, sir.

Q. When Mr. Heines handed you these briefs in the different cases, did he say anything to you? A. Nothing, except I stated to him, upon his calling, either the following day or later in that day, that I had looked over the briefs and it appeared that he had covered the cases very fully. I asked him whether or not he had anything further to say, to which he made reply that he had not, except that he desired to have the Department consider in connection with the cases, a little pamphlet which he handed me which showed the high regard in which the clergy,—I believe it was the clergy,—held the publication. And that circumstance I made a memorandum of and filed it in the case.

Q. Do you remember what was the name of that pamphlet
254 to which he referred? A. I cannot recall it.

Q. If I refresh your recollection with a statement that it was "A General Description of the Character and Influence of the Present Day Dime Novels," would you recollect now if that was the name? A. That was the pamphlet.

Q. What, if anything, did you say to him with respect to the consideration which would be accorded the brief and the time of decision in the case? A. I told him that the brief and the pamphlet would be carefully considered and that a decision would be rendered in due course.

Q. The complainant swears in the bill that the superintendent of the Classification Division of the Post Office stated that he was not advised that he was to conduct a hearing, and was unprepared to proceed with it. I will ask you if that is a true statement of what happened, to your recollection? A. I have no recollection of any such statement.

Q. Did you, as a matter of fact, make such a statement? A. Not to my knowledge; no, sir.

Q. Did you say anything to Mr. Heines, suggesting, or inducing him not to make a statement, or not to make an argument, if he cared to do so? A. No, sir.

Q. Did you tell him he could not do so? A. No, sir.

255 Q. Did Mr. Heines say to you that he desired to make a further statement of his cases? A. He appeared perfectly satisfied to rest it upon the presentation of the brief and the little pamphlet, the title of which you have just read to me.

Q. Did he, as a matter of fact, submit that pamphlet afterwards? A. He handed it to me and asked me that it be considered.

Q. Did Mr. Heines state for whom he appeared on that occasion? A. He presented briefs in each of the cases at issue and it was reasonable to suppose that he was appearing for the publishers of each of the publications, and I took it for granted that he was so appearing.

Q. I suppose, Mr. Bacon, you took these papers and put them in

the proper files? A. In the regular course of business the same as I treat any other case.

Q. Then, in due time, they found their way to the Third Assistant Postmaster General? A. They did. In order that they might receive due consideration.

Mr. McNAMARA: We offer the card in evidence, which is marked "Bacon Exhibit 1". We also offer the brief of Work and Win as "Bacon Exhibit 2".

It is stipulated by and between counsel that on the occasion of Mr. Heines' visit in response to the citation, he filed a printed state-
256 ment and argument similar to that presented in the case of Work and Win, in the case of Tip Top Weekly and the other cases then under investigation.

Q. Mr. Bacon, in the course of your duties as Chief of that Bureau, or the Division of Classification, you have to do, have you not, with the matter of classifying publications in the second or third class of mail? A. Yes, sir.

Q. Have you also to do with the questions of possible exclusion of matter from the second class mail? A. Yes.

Q. And your actions on these occasions were under your general duties in these matters? A. They were.

Cross-examination.

By Mr. GLASSIE:

Q. Will you look at this paper, which purports to be a letter from the Post Office Department, Third Assistant Postmaster General, Division of Classification, under date of July 26, 1907, addressed to the Postmaster at New York, and notifying him that the publications in question here had been excluded from second class, and state whether or not the original of that paper emanated from your office? A. It did.

Q. I draw your attention to this statement: "In con-ection with the rule to show cause, you are informed that a hearing was given to the publishers of the Nick Carter Weekly, Buffalo Bill Stories, the Tip Top Weekly and Diamond Dick, Jr. at this office on
257 June 11, 1907." Will you be good enough to state whether the hearing there referred to took place before you or before the Third Assistant Postmaster General? A. Before me.

Q. No other hearing except the one before you is referred to in this letter? A. No, sir.

Q. Did you decide yourself, upon your own responsibility as an officer of the Department? A. No, sir.

Q. The decision, if any, which excluded the complainant's publications, was made by somebody else? A. Yes, sir.

Q. In hearings granted to the interested parties upon the question whether the second class mail privileges once accorded a publication shall be suspended or annulled, upon whom, according to the practice of your office, is the burden of proof? A. Upon the publisher.

Q. Will you be good enough to look at this paper dated May 17

1907, purporting to be a notice to the publishers of the Tip Top Weekly, and especially at these words: "You are hereby notified that in accordance with the Act of Congress approved 1901 (Ch. 851, 31 stats. et al. 1107) you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at 2 o'clock P. M., on Tuesday, June 11, 1907." That is the rule to show cause in this case, is it not? A. It is.

Q. [First line illegible in copy.]

258 the Third Assistant Postmaster General" are intended to mean the office of the Third Assistant Postmaster General himself or the office of the Superintendent of Classification?

Mr. McNAMARA: Now, that is rather a question of law. That is objected to because it raises a question of law? It is not open to counsel for complainant to argue whether the language "The office of the Third Assistant Postmaster General" may mean the room in which that official is housed at the time, or it may mean that subdivision of the Post Office Department by which a certain branch of the duties is relegated to the Third Assistant Postmaster General.

Mr. GLASSIE: With all respect and objection to the argument of counsel, I insist on the witness answering the question, forgetting the very ingenious suggestion of counsel.

Mr. McNAMARA: Go ahead, Mr. Bacon.

A. I have always taken that to mean that the hearing would be either before the Third Assistant himself or the Acting Third Assistant, or before the Superintendent of the Division of Classification, as the circumstances warranted.

Q. Does that understanding include having such hearing before any clerk in the office of the Superintendent of the Division of Classification?

Mr. McNAMARA: I object to that as speculative purely.

A. Not necessarily; but if it was necessary to have the hearing before a clerk qualified to grant the hearing, that citation would be regarded as covering such a contingency.

Q. Are there any other offices or bureaus or divisions in

259 the office of the Third Assistant Postmaster General, other than the Division of Classification? A. There are.

Q. When the Division of Classification in the offices of the Third Assistant Postmaster General is meant, as distinguished from the office of the Third Assistant Postmaster General himself, is it not the practice so to state it in explicit terms? A. Not necessarily.

Q. Until Mr. Heines came down to your office with this card with the words "Mr. Bacon, A. L. L." written on it, what intimation had you received that you and not the Third Assistant Postmaster General was to conduct this hearing? A. The fact that as a rule at the hearings conducted by the Third Assistant Postmaster General in person, I am in attendance and it devolves upon me at such hearings usually to assist the Third Assistant. Therefore I was not unprepared, nor was it unexpected that the case would be heard before me.

Q. What did you say to Mr. Heines which you regard as a part of that hearing? A. I cannot recall the details of the conversation, other than it is my custom in hearings of that kind to make inquiries as to the reason for the gentleman appearing, what cases he represents, and ask him to present his arguments, both written and oral, and to advise him that the case will be considered. That procedure was followed in this particular case.

Q. Will you explain how the Third Assistant Postmaster General considers oral arguments made before you? A. If any oral
260 argument is made it is usually my practice to make a brief statement of the facts presented for consideration of the Third Assistant Postmaster General in finally passing upon the questions at issue.

Q. Do you remember Mr. Heines saying to you that he was down there to answer any questions that you might ask? A. Not necessarily; no, sir.

Q. Is your memory very clear about that? A. Not as to the details.

Q. Did you ask him any questions? A. The question whether in addition to his written statement he had any verbal statements that he cared to make.

Q. Did you ask him about the publications? A. I do not remember.

Q. Well, now, isn't it true Mr. Bacon that he asked you whether in respect of this hearing, you, as Superintendent of Classification, had any question to ask him about the subject matter of the hearing, and that you replied, "No" that you had not? A. I do not remember as to that. No, sir.

Q. You do not deny that that may be a substantial, accurate statement? A. It may be that that is the fact.

Q. What ground, reason, or matter of any sort, did you state to Mr. Heines in support of any charge or allegation in the citation? A. I made no statement to Mr. Heines.

Q. In the 15th paragraph of the answer of the defendant, the Postmaster General, there is a statement that in deciding whether this publication was a periodical, the Third Assistant con-
261 sidered, "Not only copies of successive numbers of the publication by comparison with the requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry." Will you be good enough to state what other evidence or facts material to such inquiry you brought to the attention of Mr. Heines at the date of this alleged hearing before you? A. There were no facts presented to Mr. Heines. It was encumbent upon Mr. Heines to present facts to the Department.

Mr. GLASSIE: That is all.

262 Redirect examination.

By Mr. MCNAMARA:

Q. In the administration of the subdivision of the work of the Post Office Department, to your knowledge, how many Assistant Postmaster Generals are there? A. Four.

Q. And are there as many offices? A. There are.

Q. Are they called the offices of the First, Second, Third and Fourth Assistant Postmaster Generals? A. They are.

Q. Under what one of those offices do you discharge your duties? A. The office of the Third Assistant Postmaster General.

Q. Does this office of the Third Assistant Postmaster General include the Division of Classification of mail matters entirely? A. No, sir. Does this office of the Third Assistant include the Division?

Q. Include it all together? A. Yes, it does.

Q. The matter of Division of Classification of the consideration of the particular classes to which a particular publication may belong falls exclusively within the province of the office of the Third Assistant Postmaster General? A. It does.

Q. Now, within that office, into what subdivision particu-
263 larly does such a consideration belong? A. To the Division of Classification.

Q. And your position is the Chief of that Division? A. Superintendent of that Division.

Q. Do you recall the initiation of the proceedings leading up to the citation issued in this cause to the Street & Smith and Frank Tousey Companies? A. In a vague way; yes, sir.

Q. Where did they originate? A. They originated in the fact that the attention of the Department was called to these publications passing in the mail at the second class rate.

Q. Did they come through your office before they reached the Third Assistant Postmaster General himself? A. What does that "they" refer to?

Q. Were the papers received and prepared in your office before the citation was issued? A. Yes, sir.

Q. So that your Division had knowledge of the papers before the citation was issued? A. Yes, sir.

Q. I will ask you if the citation in this case was issued on that recommendation? A. With my knowledge and approval.

Q. If Mr. Heines filed these briefs, you stated you examined them and told him you thought they were rather complete and pretty well prepared? A. Apparently covered the cases very comprehensively.

Q. I will ask you if then or at any other time Mr. Heines told you that he wanted to make further argument or to offer
264 other evidence? A. My understanding of the attitude of Mr. Heines was that he was perfectly willing to rest his cases on the written argument which he presented, consisting of the brief and the little pamphlet entitled——

Q. To which you referred, The Influence of the Dime Novel? A. Yes, sir.

Q. You state that after you hear the matter or consider the written brief you make a report to the Third Assistant? A. I present the material facts to the Third Assistant and he considers the same.

Q. Do you also discuss the matter with the Third Assistant? A. Yes, sir.

Q. And in this case did you refer the matter and the report of

the essential facts to, and discuss the case with, the Third Assistant? A. I did, in detail.

Q. In detail? A. Yes, sir.

Q. Counsel for complainant calls your attention to a statement that the Third Assistant Postmaster General considered not only copies of successive numbers of the publications by comparison with the Act of March 3, 1879, and also all other evidence and facts material to such inquiry. Now, so far as your knowledge goes, the other evidence and facts material to such inquiry were those which were presented in the briefs filed by Mr. Heines, the evidence of the publications themselves, which we might call documentary, and your discussion with the Third Assistant Postmaster Gen-
265 eral? A. Yes, sir.

Mr. GLASSIE: I object, first on the ground that the question is leading. Secondly, that it is irrelevant and immaterial what the facts and evidence may have been, for the facts and evidence upon which the case was decided were never communicated to the person entitled to the hearing, and thirdly, that statements made by one officer conducting a hearing to another officer apparently deciding upon that hearing, are not within the category of facts.

Q. I will ask you if on that occasion, or at any other time, the Third Assistant considered any evidence or any facts outside of those referred to in the citation of the evidence and facts presented by the copies of the publications under consideration, and of the evidence and facts presented by Mr. Heines in his printed briefs?

Mr. GLASSIE: I object to that as calling for hearesay testimony, because the witness cannot testify to what the other man considered in his mind; he can only testify as to what the other man told him he considered and he can be produced as a witness.

Q. I said, so far as your knowledge goes, in the discussion and consideration you had with Mr. Lawshee,—restricting my question to that limitation,—did he then go outside of the record in any way or take into consideration any facts or evidence except those in the original citation, those contained in the answer filed by Mr. Heines, and those presented by the copies of the Publications them-
266 selves which were under consideration? A. No, sir.

Q. Mr. Bacon, you were asked by Mr. Glassie, if on the occasion of this visit of Mr. Heines, Mr. Heines asked you if you desired to ask him any questions. You recall him asking you that? A. I cannot recall definitely.

Q. What is your best recollection? A. I would consider any statement that Mr. Heines might care to make in response to the citation. He was at perfect liberty to make any statement, written or oral, he desired to make.

Q. Did you or did you not want to ask him any questions?

Mr. GLASSIE: I object to that because the memory of the witness has already been exhausted by his counsel.

Q. Do you recall whether Mr. Heines asked you if you wanted to ask him any questions? A. I do not recall that. I would not necessarily ask Mr. Heines any questions.

POOR COPY

Q. Do you recall that he did not ask you? A. I cannot say that he did not.

Q. Your memory is indefinite as to the thing itself? A. As to the detail, yes.

Q. As to whether you wanted to ask him any questions or not? A. Yes, sir.

Recross examination.

By Mr. GLASSIE:

267 Q. There is no stenographic record kept of this so-called hearing? A. No, sir; there was no stenographic record kept, other than a memorandum which I made and filed in the case.

Q. When you say that after oral argument before you, you presented the essential and material facts to the Third Assistant Postmaster General, you mean of course the facts which you regarded as essential and material? A. I mean the facts which throw any light, in my opinion, upon the question at issue, which as a rule are incorporated as a part of a memorandum which I prepare in each case just the same as in this particular case a memorandum was prepared briefly setting out the facts that Mr. Heines had called and presented the briefs heretofore referred to and the little pamphlet on the subject of the dime novel.

Q. You don't profess, Mr. Bacon, to testify as to what operated upon Mr. Lawshee's mind in deciding these cases, do you? A. I presume it was the consideration of the evidence that led him to reach his conclusion.

Q. What weight he gave to the evidence, or how his mind operated upon that evidence, is something you don't profess to testify about, do you? A. I don't think for Mr. Lawshee.

Q. No. Now, then, how are you able to say that when the Postmaster General in his answer says that this decision was reached upon all other evidence and facts material to such inquiry, you know exactly of what all that other evidence and facts consisted? A. Not necessarily, but I do know that he had the com-
268 plete record of the cases before him, that he read the brief on behalf of the publishers and all the other papers in the case, for I was with him at the time that that act was taken.

Q. In other words, you know what you submitted to him? A. And I know that he considered what I submited to him, which was the complete record in the case.

Q. When you say "considered," do you mean he had before him? A. Yes; had before him.

Q. So, coming back to this, all that you know about it is that, you submitted to him what you called a record, with such views of your own as you saw fit to communicate, and the matter then rested with him? A. Yes, sir.

Mr. MCNAMARA: And his decision was then made upon that?

The WITNESS: It was.

Mr. MCNAMARA: You say there was no stenographic report or record of these hearings. I will ask you if that is true when a publisher does not file a printed brief, but makes an oral argument?

The WITNESS: We insist upon having a written statement, but

should the publisher express a desire of presenting an oral argument, and it is deemed advisable to have a transcript made, we use the stenographers for that purpose.

Witness excused.

HARWOOD M. BACON.

Subscribed and sworn to before me, this 22nd day of July 1908.

FRANK D. BLACKISTONE,
Examiner in Chancery.

269 Whereupon JACKSON A. DUE, a witness called by and on behalf of the defendant, having been first duly sworn, testified as follows:

By Mr. MCNAMARA:

Q. Mr. Due, what is your position? A. Secretary and confidential clerk to the Third Assistant Postmaster General.

Q. Did you have that position in the month of June, 1907? A. Yes, sir.

Q. Do you recall a visit of a Mr. Heines of New York, at your office in the month of June, 1907? A. I do not recall the name. I recall a representative of some firm.

Q. Some firm in New York? A. Yes.

Q. Do you remember what the firm was? A. Street & Smith.

Q. When did he call upon you, if you recall? A. I do not remember the exact date; sometime in June.

Q. When he did call upon you, what did he say? A. He wanted to see the Third Assistant, he said, relative to the application of Street & Smith for second class mailing privilege, as well as I remember. I cannot tell the exact words he said now.

Q. What did you do? A. I went in to see Mr. Lawshee,
270 the Third Assistant, who was engaged at that time with some other parties, and he said he could not see him at that time, to send him down to the Superintendent of the Classification Division.

Q. Who is that person? A. Mr. Bacon.

Q. What did you do? A. I went out and told the gentleman what Mr. Lawshe said, to go to see Mr. Bacon, and after he got through going over the matter with him that if he then wanted to see Mr. Lawshee, he could come back.

Q. Did you do anything else? A. I telephoned Mr. Bacon that I had sent him down.

Q. Sent the man down? A. Yes.

Q. Did this man come back? A. No, sir; he did not.

Q. You did not see him after that? A. No; I did not.

Q. Did you hear any more from Mr. Bacon? A. Mr. Bacon telephoned me later that he had gone over the matter with this gentleman and asked if Mr. Lawshe wanted to see him.

Q. What did you say, if anything? A. That Mr. Lawshe had nothing to see him about unless the gentleman wanted to see him, and if he did, he could come up.

POOR COP

Q. Did he come up? A. No; he did not. Mr. Bacon said that he said nothing.

271 Mr. GLASSIE: I object to the conversation over the telephone between Mr. Bacon and the witness, as being hearsay, as not being in the presence of the representative of the complainant.

Q. As a matter of fact, this gentleman did not return to your office? A. He did not.

Cross-examination.

By Mr. GLASSIE:

Q. How clear is your recollection of this matter? A. How clear?
Q. Yes. A. Well, I do not know how to answer your question, but the gentleman came in the office and said he wanted to see the Third Assistant.
Q. Is that all you remember about it? A. No. I asked the Third Assistant if he would see him but he was engaged with other people and I went out and told him he could take it up with Superintendant of the Classification Division and then if he wanted to come back he could do so. Later the Superintendent of Classification telephoned me as I stated.
Q. Was this gentleman in your office at that time on two separate days, or only on one day? A. Two days, as I remember it.
Q. Then the matter you testified to in chief, happened on the two days? A. Happened on the second day.

272 Q. What happened on the first day? A. The first day he wanted to say that he was here to see Mr. Lawshee in answer to a hearing which was set for the next day.
Q. What else happened? A. I told him he could come back the next day.
Q. Is that all you remember? A. That is all I remember at that time, of that first day.
Q. You did not say anything about that in chief. A. He did not ask me any questions about any first day.
Q. Don't you remember, Mr. Due, that this gentleman left a printed argument, several copies of printed arguments in the cases with you on the first day? A. He may have left some papers; I did not go through them.
Q. Didn't he say to you that he left these arguments in advance of the hearing in order that the Department might have the benefit of examining them before the date of the hearing? A. I do not remember about it.
Q. You would not say that that was not a fact? A. No; I would not say it was not a fact. He may have left them. I know he was in the office two days.
Q. How many times was he in your office on the first day? A. He may have been in twice, but I do not remember but one visit.

273 Q. Now, on the second day this gentleman, whom we all admit to be Mr. Heines, came, did he not tell you that he came there to see the Third Assistant Postmaster General by

reason of this appointment in the citation? A. This second day you refer to?

Q. Yes. A. Yes.

Q. Mr. Lawshee, the Third Assistant Postmaster General was engaged and could not see him? A. At that time.

Q. And Mr. Lawshee wrote Mr. Bacon's name on a card, didn't he, on Mr. Heines card? A. I do not remember the card, but that is a custom of his.

Q. Will you look at that card and see whether that is Mr. Lawshee's handwriting? A. Well, I would say that is a familiar handwriting.

Q. Is it? You are his private secretary. A. I would not say that that is. It looks like it.

Q. Have you any doubts that it is his handwriting? A. There is a little doubt on the last "L."; that is all.

Q. Well, if Mr. Lawshee wrote that on there, Mr. Heines' card must have been taken into Mr. Lawshee. A. Yes.

Q. Now, what was said when you handed that card, with that endorsement, back to the gentleman; you told him about Mr. Bacon? A. Told him Mr. Lawshee said to go and see Mr. Bacon and take it up with him and after he finished with Mr. Bacon,
274 if necessary he could come back and that he would then be ready to see him.

Q. What do you mean by "necessary", Mr. Due? A. If after going over the matter with Mr. Bacon there were any questions still to be settled, that they wanted him to take up, for him to take them up with Mr. Lawshe.

Q. Now, do you remember that after the gentleman left with the card to go and see Mr. Bacon, that he returned again? A. Not that afternoon.

Q. Well, did he return at all? A. Not that I remember of.

Q. Well, are you willing to state that he did not? A. No; I would not say that he did not return.

Q. Will you be good enough to tell us what was the last thing that gentleman said to you, or the substance of it? A. About the only thing I remember his saying to me was that he wanted to see the Third Assistant, and why he wanted to see him.

Q. You do not remember any subsequent conversation? A. No.

Q. Did you make any stenographic record of this interview? A. Not at that time. I did later. Not stenographic though; I wrote it out.

Q. And I presume when this suit was filed and an answer was prepared, you gave that statement of the matter to the Third Assistant, or Mr. Webster, or somebody acting for the Third
275 Assistant? A. To the Third Assistant.

(Witness excused.)

JACKSON A. DUE.

Whereupon an adjournment was taken subject to notice.

Subscribed and sworn to before me this 22nd day of July, 1908.

FRANK D. BLACKISTONE,
Examiner in Chancery.

276 In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading Under the Firm Name of Street & Smith.

vs.

GEORGE VON L. MEYER, Postmaster General of the United States.

WASHINGTON, D. C., *December* 16, 1908—
2:30 o'clock p. m.

Appearances:

Present on behalf of the complainants: H. H. Glassie, Esq., and J. J. Darlington, Esq.

Present on behalf of the defendants: Stewart McNamara, Esq.

Whereupon ZED H. COPP, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. MCNAMARA:

277 Q. Mr. Copp, your full name is what? A. Zed H. Copp.

Q. Where do you reside? A. My local address?

Q. Yes. A. 1675 Wisconsin Avenue, Washington.

Q. Are you a minister of the gospel by profession? A. Yes, sir.

Q. Are you connected with any church at the present time? A. Assistant pastor of Bethany Chapel, Presbyterian.

Q. How long have you been in that avocation? A. As assistant pastor two years in September. Previous to June, 1900, ten years active pastoral work; but from June, 1900, until two years ago, my time was given to sociological work entirely.

Q. You have been in the ministry altogether how long? A. About sixteen years.

Q. Have you any official position in the City of Washington? A. Yes, sir.

Q. What is it, please? A. Chief Probation officer of the Juvenile Court.

Q. How long have you held that position? A. Since July 15th, 1901.

Q. In your various pastoral duties as a minister, and in your official duties as Chief Probation Officer, have you had expe-
278 rience with young boys, observed their habits, and manners, and the like? A. I have, yes.

Q. Do you have much of that to do in your official position as Chief Probation Officer? A. That is my principal work, to investigate the cause of crime and endeavor to correct misdirected ideas existing among juveniles.

Mr. DARLINGTON: Correct what?

The WITNESS: Misconceptions or misdirected ideas.

By Mr. McNAMARA:

Q. Are you familiar with publications known as "Work and Win" and "Tip Top Weekly"? A. Yes.

Q. Are you familiar also with other publications of like character, "Buffalo Bill" series, detective series? A. Yes, sir.

Q. They are weekly publications, are they not? A. Yes.

Q. And they are similar to those different copies that you have before you?

Mr. GLASSIE: You mean the publications involved in this suit?

Mr. DARLINGTON: If the question is meant as to whether the Buffalo Bill series are similar to the publications involved in this suit, I must object to the competency of it.

Mr. McNAMARA: The question only calls for an answer as to outward appearance, price, and not as to contents.

279 Mr. DARLINGTON: I object to that; that is not a matter of expert opinion or expert proof.

The WITNESS: I have always considered this literature in the same class.

Mr. DARLINGTON: I object to the answer and move to strike it out as improper.

By Mr. McNAMARA:

Q. Have you observed whether or not these boys who have come under your observation in your official and ministerial duties were in touch with literature of that kind?

Mr. DARLINGTON: One moment.

Mr. GLASSIE: I object. It is irrelevant, incompetent and immaterial. They might have been in touch with it as well as with thousands of other forms of literature.

Mr. DARLINGTON: I object to it on the further ground that it calls for a conclusion and not for facts, and is incompetent.

By Mr. McNAMARA:

Q. Now proceed, Mr. Copp. A. Yes; it occurs frequently in the court that delinquency is traced directly or indirectly to such class of literature.

Q. Do you know, as a matter of fact——

Mr. DARLINGTON: We object to the answer and move to strike it out on the grounds that it is a conclusion, and carefully fails to disclose any facts.

By Mr. McNAMARA:

Q. Do you know, as a matter of fact, that these boys, or any portion of those whom you have seen, read the publication known as "Work and Win" and "Tip Top Weekly"?

280 Mr. GLASSIE: We object, on the ground that the fact is totally irrelevant. They also may read the daily newspapers. There is no inference relative to the cause at issue to be drawn from either fact.

By Mr. McNAMARA:

Q. Proceed, Mr. Copp. A. To those boys whose offence has involved moral turpitude, I cannot say that I have. I have found among boys under my supervision, I found them in possession of copies of those publications, "Work and Win" or "Tip Top Weekly."

Q. Are you familiar with the character of the publication known as "Work and Win"? A. Yes, sir.

Q. Have you examined several of the copies of such publication? A. I have.

Q. Are you prepared to state from your knowledge of the publication of "Work and Win," what is the effect of literature of that kind upon the juvenile mind? A. I am.

Q. Will you state——

Mr. GLASSIE: I object on the ground that the question whether "Work and Win" is entitled to second class privilege, is a question of the requirements of the statute, specifically enumerating certain conditions, among which are not included the effect of such publications, in the opinion of this witness or any other witness or person, upon the juvenile mind.

Mr. McNAMARA: The testimony is offered, following the
281 line of testimony already adduced by the complainant in proving that the publications of "Work and Win" and "Tip Top Weekly" are wholesome in their character and very popular for the young mind.

By Mr. McNAMARA:

Q. Will you state what the effect is? A. Before I answer that question, I would like to make a correction as to the length of my ministerial life—that ought to be eighteen instead of sixteen years.

Mr. GLASSIE: That is all right.

Mr. DARLINGTON: I object to the question as calling for opinioned evidence, unaccompanied by any statement of facts. I submit that the facts should be stated and the Court left to draw the inferences; and that it is incompetent to submit the conclusions or inferences of the witness upon the evidence.

By Mr. McNAMARA:

Q. Proceed, Mr. Copp. A. My investigation both from reading this literature and from actual observation as to the effect of kindred literature, leads me to believe that it is disastrous upon the young mind.

Mr. GLASSIE: I move to strike out the answer on the ground that it is based upon the observation of "kindred" literature and not upon the publications involved in this cause.

By Mr. McNAMARA:

Q. When you speak of kindred literature, will you state what it is you mean. A. Literature of a class similar to these publi-
282 cations. I had in mind, if you will allow me to qualify that answer, the delinquency occurring among the gang of boys,

as they are commonly termed, that arose during the erection of the Union Station, when a number of boys, about half a dozen, if I remember correctly, were delinquents, absent from home, dissipated in their habits as boys, living in a room which they had excavated, a rather fair sized room, which was fitted up for living purposes, where they had cards, beer, they cooked their food which they had stolen, and in which they lived a dissolute life from a boy's standpoint, and it was induced by similar reading. I cannot say it was induced by reading this literature, but it was induced by reading literature of this character, and much of such literature was found in that room.

Mr. DARLINGTON: I make the same objection to the answer as to the question; and further upon the ground that instead of having any facts upon which the Court can act, we are simply treated to the witness' inference, as to what induced, what he designates, the delinquency of the boys. This in addition to objections which have heretofore been made; and it is agreed that this objection and all and each of the foregoing objections and grounds stated for them shall apply to each and every subsequent question and subsequent answer of a similar character, without being repeated.

By Mr. MCNAMARA:

Q. From your examination of different numbers and publications of "Work and Win" and "Tip Top Weekly" the publications which are involved in these proceedings, what would you say as to
283 the effect of those publications, from the standpoint of a wholesome or unwholesome character, upon the youthful mind? A. They are unwholesome, for two reasons; first, the work itself, the fiction itself, is not true, not true to life; in the second place, the minds absorbing such literature are not able to distinguish between the real and the true, and it gives a false idea of life. From this, there comes incorrigibility, a restiveness under home ties and helpful home life. I notice the conspicuous absence in this work of anything that lauded the commonplace. There was not anything said about getting up early and doing the chores about the farm, and sweeping out the store, or those commonplace duties of life; on the contrary, the extraordinary is made prominent. It would seem to me to inspire the boy's mind with the fact that if he shall be a great man, and in order to emulate the characters portrayed in these publications, he must go away from home, and he must do the impossible or the seemingly impossible, everywhere he goes; if he does not do that, he goes down to the commonplace, and the commonplace is lost sight of in the common herd; and that has always been harmful to well developed boyish life.

Q. From your knowledge of these publications, "Work and Win" and "Tip Top Weekly," what would you say as to their effect on the youthful mind in inciting impatience of parental restraint?

Mr. GLASSIE: We object on the additional ground that the witness has not qualified himself by showing any knowledge of these
284 particular publications, "Work and Win" and "Tip Top Weekly," and therefore has disabled himself from answering the question.

Mr. McNAMARA: The answer to that is that counsel states he has already said that he has examined the publications, "Work and Win" and "Tip Top Weekly" and he is answering these questions on previous knowledge of such examinations.

Mr. GLASSIE: We object also upon the further ground that the question does not confine the witness' answer to his knowledge of these publications.

By Mr. McNAMARA:

Q. Proceed, Mr. Copp. A. I will ask you to restate your question.

Q. Yes.

(Stenographer reads pending question.)

A. As I before indicated, it tends to produce incorrigibility, for the reasons previously given.

Q. And what would you say as to the same publications, from your knowledge which you have already referred to, as to the effect upon the young man, with respect to daring and adventure? A. From my investigation of this work, and from my experience——

Mr. DARLINGTON: "This work;" what is "this work"?

The WITNESS: From these works, from my investigation of the publications "Work and Win" and "Tip Top Weekly," interpreting the spirit of it, it fits in admirably with what I have found in my work as Chief Probation Officer, that boys get the idea
285 that if they are to be protected, and emulate the character they find in fiction, they must have weapons. It has been less than ten days since a boy was taken up on the Avenue for carrying a black-jack, and his duties were principally daylight duties, and yet he carried a black-jack. The boy was young in years, and boys of mature years, have been brought into court for carrying concealed weapons, when they have admitted to the Court——

Mr. DARLINGTON: I must object to all this.

Mr. McNAMARA: Of course. We will just leave that there. We could not use those admissions against this company, unfortunately, probably.

The WITNESS: I just meant to state that my experience with boys would corroborate the spirit that seems to breathe in such literature as to daring and emulation.

Mr. DARLINGTON: We object to that, and move to strike it out, as showing nothing but the inference of the witness to sustain his theories.

By Mr. McNAMARA:

Q. Have you made any recent examinations of several numbers of "Work and Win" and "Tip Top Weekly?" A. I have.

Q. And could you state in a general way from that examination what is the general character of these publications from the standpoint of hurtfulness or not, to the young mind?

Mr. DARLINGTON: I object. The conclusion of the witness as to

these publications is not the proper way to prove them. The
286 Court is quite as competent to judge of them as this witness. We are simply getting inferences secondhand from a professional person engaged largely in theoretical work.

A. I can and will. Do you wish me to refer specifically to the numbers?

Q. Yes; I wish you would. A. I found, upon a careful review of Number 488——

Q. Of what publication? A. Of "Work and Win." The prominent feature is the unreal, the return of the hero home with trainloads of friends, and general unreal conditions that surround the life portrayed. In Number 489, we found in this a spirit of bragging, reaching the point of explaining to an admiring crowd all of the wonderful attributes of the leading character of the book. In 490, the leading thought in that was moroseness, vindictiveness, and a graphic suicide. In 492 we have kidnapping described, an attempted murder, methods of escape from prison and a Wild West lynching. In 494, which probably is the worst of those I examined——

Mr. DARLINGTON: 494?

The WITNESS: 494. (Continuing:) It simply seethes from beginning to end with conspiracy, murder and revenge. It is surcharged with trickery, bribery and corruption. May I revert to 494 just for a moment?

Q. Yes. A. There is one statement of the hero that fixed my attention. It is his own language. His admirers are made to say
"Oh, all the boys know you, and they all try to be like you.
287 We have read about you and I want to grow up and learn to fight and shoot a gun like you do." It was the fact that the admiring crowd were made to say that they wanted to be like this remarkable character, who was not true to life, that fixed my attention.

Q. What have you to say, Mr. Copp, as to the tendency of these publications, "Work and Win," in inciting young minds to do the impossible, and by that token making them discontented with the ordinary, plain duties of life?

Mr. DARLINGTON: I object to the question as being leading, suggestive of an incompetent answer, and asking for opinion evidence.

A. It would make him dissatisfied with the commonplace. It would make him seek after that which is not easily attainable. It would unfit a boy for good office work. It would unfit a boy for proper study in his school. It would unfit him for a pleasant home relation, and would build in his life, in my judgment, a foundation which, if not corrected, before he reached mature years, would topple over on him.

Q. In some of the answers to some of my previous questions, before you came to these specific books of "Work and Win" and "Top Weekly," you stated——

Mr. GLASSIE: He has not mentioned any specific issues of "Top Weekly."

Mr. McNAMARA: Oh yes.
Mr. GLASSIE: I beg your pardon.

By Mr. McNAMARA:

Q. You refer to the general literature of this class, now I will ask you if you know any of the names of that general literature,
288 or the publications you had in mind when you made that answer?

Mr. DARLINGTON: We object. We think you have gone quite far afield already in opinion evidence; but when this witness testifies as to his opinion of what other serials or works or publications than those of the complainants are like, I submit is further than we have even yet been treated to.

Mr. McNAMARA: Counsel misconceives the question. I am not asking him for his opinion but for his actual knowledge of the other publication which he mentioned when he spoke of literature "of this general class."

Mr. DARLINGTON: That is the way I understood the question. It is to that question I object.

A. Nick Carter is one, Boys of Seventy-Six, Buffalo Bill, and Diamond Dick. They are four. These (indicating) I did not have in mind.

Q. Do I then understand that these are the publications you had in mind when you spoke of literature of the same general class as "Work and Win" and "Tip Top Weekly"? A. Those and another class—this is a New York publication, but if I remember correctly there is or was this other firm, but this firm may have absorbed that other house, that I used to be in touch with. There was another publication, another publishing house in New York, publishing a similar class of literature, which I had in mind when I mentioned this.

Q. Now, just describe in your own way, as a summary of your reading and your knowledge of the publications of "Work and
289 Win" and "Tip Top Weekly," what is the general character of stories those books contain?

Mr. DARLINGTON: We object. Any stories that are obtainable can be produced before the court and it does not need the reflected opinion of this witness in order to enable the court to reach a just conclusion in this cause.

A. Unhesitatingly demoralizing, specifically, because the picture of the hero is small in the foreground, and he is not true to nature. The background, which is a large one, is usually filled up with things which, as I previously indicated in specific numbers, entirely obscure even the supposed benefits of the hero. As to Tip Top Weeklies, if you desire some, I have reviewed some of those copies, do you care for that?

Q. Yes; proceed.

Mr. GLASSIE: What is this in answer to?

Mr. McNAMARA: He is continuing his answer. Proceed, Mr. Copp.

The WITNESS: Number 625 and 626 breathe the same spirit of hate, envy, treachery, vandalism, and robbery.

By Mr. MCNAMARA:

Q. Those are almost the nine common law felonies. A. Well, they are there, gentlemen. 627 describes drunkenness; 628 describes in a graphic way detailed intrigues against a rival, and a fistic encounter as the way of settling a difficulty, 631 seems to place on the lighter side of an offence violation of school law, school rules, and describes minutely a gambling scene; and 638 is another deceptive book, corresponding in that series to the one which I have indicated in
290 another series, and it sets forth in a revolting way drunkenness, tramp life, murder and blackmail. I should say by way of continuation that a boy after having read these stories would be under restraint at home. He would feel that the ordinary home life was a commonplace, humdrum affair, and that if he were going to amount to anything, having the hero as an ideal, it would be up to him to get just right out from home and do some of the things that the hero was doing.

Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Copp, you give assistant pastor of Bethany Chapel as your occupation. Is that your source of livelihood? A. I guess not. That should have been modified at that point by saying my occupation is pastor and Chief Probation Officer.

Q. Why did you give that as your occupation? A. Because it is part of my occupation.

Q. It is by no means your principal occupation? A. No, sir; it is not.

Q. A comparatively small part of it? A. Yes.

Q. And yet you gave that as your occupation and left the other out. Now, why? A. I think, if you will notice my answer later, that comes in. So that my answer was full and complete though it did not come at that period.

291 Q. As a matter of fact your occupation is the exploitation of the so-called sociological side of boy life; is it not? A. No; it is not that. It is the practical side of dealing with child offenders.

Q. What is your salary as pastor of Bethany Chapel? A. Fifteen dollars a month.

Q. What is your salary in your position in the Juvenile Court? A. Fifteen hundred dollars a year. I want to say in defence of my people that that is a mission point. Bethany Chapel is a mission of the New York Avenue Presbyterian Church.

Q. How many publications of Street and Smith have you read? A. I did not understand your question.

Q. How many publications of these complainants, Street and Smith, have you read? A. You refer to these publications?

Q. Yes. A. I have reviewed carefully sixteen of them, and looked over a number of others.

Q. You mean the ones now on the desk before you? A. Yes.

POOR COP

Q. Where did you get those? A. They were sent to me
Q. By whom? A. By the Post Office Department.
292 Q. By whom? A. By Mr.—I suppose from Mr. Webster. I don't know.

Q. You know who sent them to you; don't you? A. Mr. Webster sent those to me; that is right. I remember he did.

Q. Did any written communication accompany them? A. Yes.

Q. Have you it with you? A. I have not.

Q. Will you produce it and file it in this case? A. I cannot produce all of it, because part of it has been destroyed. It would be of no consequence in the case any way.

Q. We would like to judge of the consequence of it, if you will produce it. A. It is a mere statement of the publications sent, and asking me to look over them.

Q. Did that communication precede or follow such oral communications as you had with the representatives of this Department in regard to the case? A. It followed my coming here after seeing published an article in the Star. I think it was, one of the newspapers. I came to Mr. Lawshe, and I have recognized the injurious effects of this literature for years upon the young mind and I came and asked if I could aid in any way in helping to prevent that literature from continuing to *prove* its poisonous stream into the minds of the young.

Q. That was before you had read any of these publications?
293 A. I have not read those except by way of review; but I have read them by the ton as a boy.

Q. Read what? A. Such class of literature.

Q. Yes. I supposed you are a very demoralized individual then, are you?

Mr. McNAMARA: Probably he wants to say that he is the exception that proves the rule.

A. I prefer not to answer as to that point.

By Mr. DARLINGTON:

Q. How general was this reading by the boys of your age and acquaintance and of your day and time, so far as is within your knowledge? A. Well, I was reared in the country——

Q. Yes. A. (Continuing:) And there was not very much of that literature read in the district in which I was reared.

Q. How did you happen to get tons of it, and the other boys escape? A. I came in touch with it because of sickness. For years I was an invalid, and during that time literature was brought to me of various publications, some of which was of that class. I soon came in touch with the Company and got the literature, and I read it for years.

Q. My question, Mr. Copp, is about the other boys of your neighborhood. Were you the only one who encountered this dire, demoralizing influence? A. I don't remember of any in my immediate neighborhood reading such literature. Now, I say I prefer
294 not to say anything further about this.

Q. Why do you say that? A. I have reasons for saying it.

Q. You think it will help out your testimony in this case to inject that remark; is that the motive? A. No; I do not.

Q. What? A. No; I do not think it would help the testimony.

Q. Did you consider that the injection of that remark into the record—— A. It was unfortunate and I would be very glad to have it eliminated, that I referred to it at all.

Q. Have you stated all the particulars which lead you to conclude that this class of literature is injurious, namely that it is unwholesome, because it is fiction which is untrue to life, because the minds of the readers are not able to distinguish between the false and the true, and because it deals with murder, hate, treachery and vandalism? A. Those are among the leading objections. The point that has fixed itself in my mind is that which I have already indicated.

Q. Well, Mr. Copp, we do not want to string this out unnecessarily, and I will ask the examiner to read the question to you, and ask you if that forms a basis of your opinion. A. Yes.

Q. Do you wish to add anything to it; if you do, you can. A. I think that covers it in a general way.

295 Q. I believe you did mention as another ground the fact that it deals with heroic events, and you think that develops the idea that a boy has got to do something heroic in order to be great? A. He has the idea that he has to be above the ordinary, every day practical life.

Q. And it does not include along the lines of heroic performances the sweeping out of stores and doing of chores and things of that sort, commonplace things? A. No. It does not put a premium upon the commonplace duties of life.

Q. Now will you kindly give us a list of the works adapted to the reading of boys which do render heroic sweeping stores and doing chores and the commonplace duties of life? A. That would be rather difficult to do off-hand.

Q. Name one book that you think is the antithesis of these bad books, and the kind you think that boys should be supplied with. A. The Alger series or the Henty books.

Q. The Alger books? A. Yes.

Q. Are they not without exception accounts of boys that leave home and go to the city and distinguish themselves and become rich and famous and great? A. Yes; and some of those books I consider objectionable and would not allow them to come into my home. I have a boy myself and I would not allow him to read some of them.

296 Q. Then why do you mention them as the books that should take precedence—— A. I have indicated some which came into my mind and among which I very carefully differentiate.

Q. You mentioned the Alger series. Are they not the "Ragged Dick" and Peter the Porter" and books of that description? A. Yes; and they do not come into my home. I take such as "Tried and True", "Slow and Sure" and "Work and Win", they are some of the books my boy is reading and has read.

Q. What proportion of the Alger series bear such titles as you now describe? A. I cannot answer that question. I am not acquainted with the entire series.

POOR COPY

Q. They are all by the same author? A. Yes. I think they are complete; some of them are complete books.

Q. Are not the majority of the Alger series just the class of publication as this, the adventures of boys who do impossible things and possess impossible virtues, measured by any standard of ordinary life? A. No, they are not. I read the books that come into the home before they come into the home.

Q. How many of them have you read that are not of the character I have described? A. I have not read any, because I am guided by the titles. I look at the title and the contents by chapters, and then to be sure I have not been misguided and that something is not hidden away injurious in the work, I read it.

297 Q. How many books of the Alger series can you mention which do not deal with theft and larceny and murder and drunkenness, and the life of the slum? A. I could not answer that question.

Q. Can you name one that does not? A. I should not like to answer that question because I might——

Q. Now give us another series of books that you think adapted to the use of boys. I suppose you concede that boys should have some literature? A. There is the greatest field for proper literature for boys.

Q. Now we are asking for that field. A. Well, I should like very much for that field to be covered.

Q. I am asking what it is. A. I say there is the greatest field for literature of the class you are indicating.

Q. You mean there is a great field and no fruit, an empty field? A. Well, there is literature that purports to be proper for that field, that claims to be.

Q. Did you ever read a book called Tom Brown of Oxford—Tom Brown of Rugby? A. No; I must confess I have not read Tom Brown.

Q. Did you ever read Vernon Greene, a history of a boy at one of the English schools? A. No.

298 Q. Did you ever read Robinson Crusoe? A. Yes.

Q. Is that a book that inculcates the sweeping out of stores and the doing of chores and staying at home, and commonplace life? A. No, it did not impress me that way.

Q. What do you think of that as a book for boys? A. I thought that was a good book for boys and my boys read it. I think it good because it describes adventures that might happen to any poor fellow who was thrown off on an island, and I think it had a practical turn to it.

Q. You think that is a book which is true to nature and deals with events that occur and omits the extraordinary and the wonderful, do you? A. Well, now as to that point, I won't say that, inasmuch as it is not the ordinary and it is the extraordinary. I can see how the ordinary might be hidden in the extraordinary occasions.

Q. Do you know any of these "Tip Top Weeklies" or "Work and Win" books which deal with as improbable and unreal conditions as Robinson Crusoe? A. No, I do not. I do not recall any.

Q. Did you ever read a book called "The Man from Glengarry",

Ralph Connor's book? A. No; but I have read those other books I have read "The Sky Pilot". I have not read "The Man from Glengarry." I would like to do so.

Q. It is rather a famous book, isn't it, "The Man from Glengarry"? A. I believe it bears that distinction, but I have
299 not read it.

Q. Does "The Sky Pilot" deal with boy life? A. No, sir; that deals with manhood life on the frontier.

Q. You are entirely unfamiliar with "The Man from Glengarry"? A. I am, except by way of book review.

Q. What is that? A. Except by way of its review.

Q. You mean that you have reviewed it? A. No, I have seen a review of it.

Q. Did you ever read "Oliver Twist" by Charles Dickens? A. I don't think I ever finished "Oliver Twist". I have started reading it.

Q. Do you regard that as a proper book for boys to read? A. I have not read it. Judging from its place as a classic, and its claim to be a good and proper book.

Q. You say you read it partly? A. Yes.

Q. You know then that Oliver Twist was a common thief and associated with thieves, and it deals with the adventures of a little street thief in the streets of London? A. Yes.

Q. You know that it deals with drunkenness and murder? A. Yes; and I know that Oliver Twist evolved into something
300 better and there was that helpful part, constant development.

Q. And some of the other characters evolved to the end of a rope, before you get to the end of the book, didn't they? A. Yes.

Q. Don't you find that same contrariety of like eventuality in the characters in these publications we are now dealing with? A. No, I did not. I found, what I read about them at least, to be true to what I know of modern city life.

Q. Mention some one of these books in which the good turned out to evil fortune or the bad to good fortune, without changing their ways of life. A. Well, it was the condition about these books that I have previously mentioned——

Q. But we are now trying to get at some facts. You gave us your opinion. Mention some one of these sixteen publications which you say you have already read, in which happiness or success comes to a bad life; or misfortune and disaster comes to a correct life? A. I cannot say that I can do that.

Q. Is not the contrary the case in these books? Is not the correct and sober and temperate and well behaved boy the one who becomes the hero and has the good fortune throughout, and is not the one who hates or drinks or steals the one who comes to grief, in all these publications? Can you recall one exception. (After a pause.) Well, Mr. Copp, you have looked over those books since I asked you the question, does that refresh your recollection so you can
301 identify one of the class that I call for? A. No, I cannot. I must confess the review is in my mind more like a kaleidoscope.

Q. You mean you read them so fast they made no impression

upon you? A. They made an impression, but I could not, under oath, revert to any one book.

Q. Do you recall any one of those publications or any character in any one of them who comes to any good end or who has anything about him to attract a boy, who either drinks or smokes or swears or does any other improper thing? A. As I have said before, there is a hero in every one of these books.

Q. But that does not answer my question. I am asking if you find any hero or near-hero or anything like a hero, any attractive character, in any one of these books who is not a total abstainer from drink, who does not swear or use vile language, who does not lead a correct moral life? A. Will you repeat that question. Do I find any character——

Q. Yes; who has about him anything attractive to a boy who is a hero, or who is held up in a manner to attract boys? A. I cannot answer the question except in my previous way. I have in mind, I think, such characters, but I could not put my hands on the book at this time.

Q. Well, Mr. Copp, we want to give you every opportunity, and agree that you may take those books, and between now and the next session I would like you to file one in the case in which
302 the hero is either a thief or drunkard or boy of bad character.

A. Now that that is your question, it is a question as to who is considered a hero. There is one central hero in each of those books.

Q. We will let you designate the one you think is a hero, and the court can judge how good a chooser of heroes you are. A. I shall be glad to do that.

Q. How long have you held the office you now hold—what is it, Chief Probation Officer? A. Since July 15, 1901.

Q. 1901? A. 1901; yes, sir.

Q. That is seven years? A. Yes, sir.

Q. Can you give us the name of any boy who has fallen under your observation during that time, whose demoralization can be traced to any one of either of these publications? A. I don't know whether it would be fair to the boy, if I were to do that.

Q. Could you do it? A. Yes, I can furnish a number of boys whose delinquency has been traced to reading bad literature.

Q. Oh, that was not the question at all. I asked you if you could name any boy whose delinquency, as you term it, can be traced to reading "Tip Top Weekly" or "Work and Win."
303 A. No; I cannot.

Q. I agree with you that bad literature is demoralizing. Is it your opinion that boys should be allowed to read history? A. Yes.

Q. Do you think a boy should be allowed to read a history of the French Revolution? A. Yes.

Q. There is lots of murder in that. A. If you will allow me to say, by way of parenthesis, I would like to see some of the copies expurgated.

Q. Whose history of the French Revolution would you like to

see expurgated? A. Well, I refer to the deeds of crime incident to that revolution.

Q. Yes, but we only find those in descriptions of writers of histories—whose history of the Revolution would you like to see expurgated? A. I cannot refer to any particular history.

Q. Whose history of the French Revolution have you read? A. I have read it in the history of the world, Ridpath's.

Q. In Ridpath's History of the World? A. And I have read it in the History of France.

Q. Whose History of France? A. I don't remember the author's name. I read it as a boy.

Q. You remember that there was any amount of hate,
304 murder, treachery and vandalism in any history of that era? Do you still think a boy ought to read it? A. From a historical standpoint?

Q. From any standpoint. A. I have already answered, yes, from the standpoint of history.

Q. Do you consider that murder and hate and envy and treachery and vindictiveness and vandalism are untrue to nature and therefore ought not to be read as tending to produce false ideals? A. No; as a matter of history they are not.

Q. As a matter of every day life, are they untrue to nature? A. Well, no; but there is a difference, if you will allow me to modify that. There is a difference between history and a manufactured story. There is a difference between Robinson Crusoe's discoveries and the usual stories of the five or ten cent novel.

Q. But if mental contact with the idea of theft and murder and drunkenness is demoralizing to youthful minds, it ought not to meet with those things anywhere, if it is demoralizing, in history or in fiction. A. Well, as a general proposition, such literature, scenes of bloodshed, murder, and robbery are harmful to the young mind.

Q. And it ought not to be brought in contract with it? A. On general principles it ought not.

Q. Do you think a boy ought to be allowed to read the
305 Bible? A. Yes.

Q. Is there any envy and hate and murder and drunkenness in that Book? A. Yes, but always with the attendant punishment.

Q. Now do you find in these series of stories that we are discussing now, any case of murder or hate or drunkenness or any of those crimes, which does not meet, in the course of the stories, with proper and attendant punishment? A. I can only answer that as I answered the one before. I don't remember distinctly enough to refer to a particular work.

Q. Do you think a boy could read a biographer's life of any great man without thinking he would have to do something heroic if he was going to be great? A. Yes. I think he might read any of the biographies of the great men, if they are true biographies.

Q. Do you think a boy would read the life of Napoleon Bonaparte, and be thereby induced to devote himself to sweeping out

stores and running errands and doing chores? A. I think so. You take the life of Napoleon Bonaparte as a boy, or the boyhood life of any of the great men——

Q. You think there is less of the extraordinary in the life of Napoleon Bonaparte than you find in any of these stories? A. I don't think there is any—they cannot be classed together because Napoleon Bonaparte was largely a man of the hour and cir-
306 cumstances which occur in a million-um, and. these stories, they occur with frequency.

Redirect examination.

By Mr. McNAMARA:

Q. Mr. Copp, in your judgment, as expressed in the answers you have made, do you draw any distinction between the deeds of men in the cases referred to by Mr. Darlington, which are singular in the world's history, and the deeds attributed to these boys in the issues of "Work and Win" and "Tip Top Weekly"—do you make any distinction between these heroic deeds which are done by full grown men and the heroic deeds which are here put to the credit of young boys? A. There ought to be the widest. A boy will endeavor to emulate another boy's deeds, and he considers a man's deeds beyond his reach until he reaches man's estate.

Recross examination.

By Mr. DARLINGTON:

Q. Do I understand you think that heroic performances by men are not injurious to boys, but that accounts of heroic acts by boys would be demoralizing to them? A. No; I did not say that.

Q. Really, Mr. Copp, do you think any boy ought to be allowed to read the story of David & Goliath? A. Yes, sir.

Q. Don't you think he would get a sling and some stones and go out to kill somebody if he read that story? A. No.

ZED H. COPP.

307 Subscribed and sworn to before me this 29th day of December, 1908.

FRANK D. BLACKSTONE.
Examiner.

Whereupon A. L. LAWSHE, Third Assistant Postmaster General, a witness of lawful age, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McNAMARA:

Q. Mr. Lawshe, you have been sworn, I believe? A. I have been sworn.

Q. You are the Third Assistant Postmaster General of the United States? A. Yes, sir.

Q. Did you hold that office during the months of May and June, 1907? A. I did.

Q. Will you tell us what part you had to do with the issuance of a citation against the publishers of "Work and Win" and "Tip Top Weekly" in the month of May, 1907? A. I directed that citations be issued and signed the citations when prepared.

Q. Were you present in the City of Washington, in the
308 Post Office building, on the 11th and 12th of June, 1907? A. I was.

Q. Have you any recollection as to whether those were the return days of the citation you have referred to? A. My recollection is that the citations were returnable on two days, I think the 11th and 12th. Dates do not impress me very much in that respect, but that is the best of my recollection. I could determine it by examining the records.

Q. Have you any recollection of an answer or response having been filed by the different publishers of those publications? A. Yes, sir.

Q. Did you have occasion in the discharge of your duties as Third Assistant Postmaster General to consider the answer with the other papers in the case? A. I did.

Q. And with any officer? A. With the Superintendent of the Division of Classification, who has immediate charge of the business.

Q. What is his name? A. Mr. H. M. Bacon, Superintendent of the Division of Classification.

Q. In the matter of that citation, and in the matter of the question as to whether the publications of "Work and Win" and "Tip Top Weekly" were entitled to second class privileges, was any decision reached and promulgated by the Department?

Mr. DARLINGTON: I object. The promulgation of the
309 result would be the only competent evidence.

Mr. MCNAMARA: Yes; that is only preliminary. You can answer that question.

A. I will ask the stenographer to read the question.

(The stenographer read the question as requested.)

A. There was.

Q. Who rendered that decision? A. I did.

Q. In the course of rendering that decision, did you consider the law and the facts as set forth in the citation mentioned in the bill of complaints and the answer of the respondent as mentioned in the bill of complaints?

Mr. DARLINGTON: We object.

A. I did.

Q. I will ask you if in the course of your consideration you consulted with Mr. Bacon, the Superintendent of Classification? A. I did.

Q. With anybody else? A. I also submitted the matter to the Assistant Attorney General for the Department for review.

Q. Was your decision to which you have just referred the decision embodied in the order of dissolution, issued June 30th, which is mentioned in the bill of complaint? A. It was.

310 Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Lawshe, how long have you held the position of Third Assistant Postmaster General? A. Since March 22nd, 1907.

Q. Prior to that time, I assume you had no connection, official or otherwise, with this question about the right to enjoy second rate privileges, second class privileges? A. If counsel assumes that, I see no necessity for answering the question.

Q. Sometimes even counsel make wrong assumptions. A. I have had some knowledge of the second class question.

Q. Were you officially connected—— A. Not officially, you said officially or otherwise.

Q. I was not referring to your knowledge but to your connection. This issuance of citations which you have referred to, with whom did the suggestion of that action originate? A. The matter was brought to my attention, as I remember it, from different sources.

Q. We would be very glad to learn what those sources were, it may be somewhat important in this case, if you can tell us. A. The matter of their being in the mail, as I recall was brought to my attention, I think, by the New York Post Office, and I also re-

311 ceived a letter from a postal official, calling my attention to the fact that these publications were passing as second class matter.

Q. And did you investigate to ascertain how long they had been enjoying that privilege?

Mr. MCNAMARA: I object to that as immaterial.

A. I understood that they had been in the second class for some time.

Q. About how long, Mr. Lawshe? A. I could not say.

Q. It seems, Mr. Lawshe, that these publications had been admitted as entitled to that privilege for about ten years before these citations. Did you learn that their character had changed in any respect during that period?

Mr. MCNAMARA: I object to that on the ground that it is immaterial whether their character has changed or not.

A. I do not know whether the character had changed or not.

Q. The issuance of these citations was not based upon any alleged change in their character which might justly take away from the privileges which had been originally accorded them?

Mr. MCNAMARA: Same objection.

A. No.

Q. Do I understand that the question of excluding these publications from the mail originated with the New York post office?

A. I would not say that definitely. I wish to make a more specific answer in one respect there. Where I used the word postal official,
I alluded to Mr. C. M. Cottermann, Director of Posts of
312 the Philippine Islands, who wrote a letter on the subject, inviting my attention to the character of the publication.

Q. And that was the origin of your—— A. I think that was the initial origin, but I would not assert it as a fact. I think so.

Q. Mr. Lawshe, isn't it a matter of fact that Mr. Bacon first suggested to you the issuance of these citations? A. Not that I recall; but I want to say this, that that would be a very natural proceeding, because mail coming in would go first to Mr. Bacon and then be called to my attention.

Q. What mail do you refer to as coming in and going to him first? A. Pertaining to the classification of mail.

Q. Could you furnish us with a copy of the letter of this Philippine official? A. How is that?

Q. Could you furnish us with a copy of the latter of this Philippine official that you mention? A. That would be a matter for counsel to determine. I would be guided by their advice.

Mr. DARLINGTON: Well, we call for it.

Mr. MCNAMARA: We must object to that, not that it has any value in the case, but simply because it is wholly immaterial. The question here is whether the Third Assistant Postmaster General, in the discharge of his duties, reviewed this case and made his decisions.
He has jurisdiction to so decide, and how he came to start the
313 investigation, or how he was prompted to consider the matter with a view to a further consideration, is, we submit, wholly immaterial.

Mr. DARLINGTON: We think we have a right to know, and we think the Government ought to be willing to show, what the origin of this movement was. It seems incomprehensible to us that this matter should originate in the Philippine Islands, in view of the fact that we never published these papers in the Filipino language, and never reached the class of business in that region.

The WITNESS: I can explain that.

Mr. DARLINGTON: We would prefer to have the letter.

The WITNESS: One is a part of the other.

Mr. DARLINGTON: When the letter is produced we will be glad to have the explanation.

Mr. MCNAMARA: Counsel for the respondents further object to this evidence on the ground that counsel for complainant- are endeavoring to make a great deal out of an immaterial matter. The Third Assistant Postmaster General had the investigation before him, as a fact——

Mr. GLASSIE: I do not want to interrupt you, but we object to this continual argument.

Mr. MCNAMARA: (Continuing.) And so having it, he made his decision, and it is submitted that it is wholly immaterial how he came to start the investigation.

Mr. DARLINGTON: Unless we can be allowed to adduce the facts in this case, we must decline to proceed with the cross examination.

Mr. McNAMARA: We will state for the record that counsel
314 has no objection to letting counsel for complainants see this letter, if it can be found among the files, but we simply think it has no place in this case, and think it ought not to be put in and encumber this record.

Mr. DARLINGTON: We do not imagine it would be a very voluminous document and would not encumber the record very much. We have no further questions in the present attitude of the case.

A. L. LAWSHE.

Subscribed and sworn to before me this 5th day of February, 1909.

FRANK D. BLACKISTONE,
Examiner.

315 In the Supreme Court of the District of Columbia.

Equity 27279.

ORMOND G. SMITH, GEORGE C. SMITH and CORA A. GOULD, Trading under the Firm Name and Style of Street & Smith,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States.

WASHINGTON, D. C., *January* 26, 1909—2 o'clock p. m.

Met pursuant to notice at the Post Office Department, office of the Third Assistant Postmaster General.

Appearances:

Present on behalf of the complainants: H. H. Glassie, Esq., and J. J. Darlington, Esq.

Present on behalf of the defendants: Stuart McNamara, Esq., and R. M. Webster, Esq.

Whereupon A. L. LAWSHE, Third Assistant Postmaster General, was recalled for further cross-examination, and cautioned that he had been duly sworn:

By Mr. McNAMARA: At the last session there was mention made of a certain letter from the Philippine Islands with respect
316 to the admission of certain publications in the second class, and the counsel for the complainants called for the production of that letter. While we cannot admit its materiality, yet as they persist in it and desire to see it, I have no objection to complying with their request for its production. We have the letter here for the purpose of your inspection. (Letter here submitted to counsel for complainants for examination.)

Mr. DARLINGTON: We offer the letter in evidence and ask to have it copied in the record. The letter reads as follows:

"Bureau of Posts of the Philippine Islands.
Office of the Director of Posts.

MANILA, P. I., *December* 26, 1906.

Third Assistant Postmaster General, Washington, D. C. (Classification Division.)

SIR: There have recently been received in the mails from the United States a number of copies of the "New Nick Carter Weekly," evidently entered as second class matter at the New York Post Office. This publication has all of the characteristics of books, and it is not understood why the same has been granted the privilege of the subsidized rate of one cent per pound. Therefore will you kindly inform me if it is now the rule of the department that such printed matter may be entered as second class mail matter.

Apropos of this, I have to say that on July 10, 1902 a similar publication issued at Manila was submitted to your office by me for a ruling, to which you replied on August 29th, 1902, No. 66330:

" 'The copy of the publication submitted with your letter has all of the characteristics of books which are by law third class matter, and which cannot by mere compliance with the technical requirements of the law governing second class matter, be admitted to that privileged class.' "

Respectfully,

C. W. COTTERMAN,
Director of Posts.

317 Cross-examination (of A. L. Lawshe continued).

By Mr. DARLINGTON:

Q. What was a similar publication issued at Manila, referred to in Mr. Cotterman's letter? A. I could not say, but that could be ascertained by reference to Classification Division, File No. 66330.

Q. Did you at any time advise the complainants in this case that the second class mail matter privileges granted them had been criticized on the ground that their publication had "all the characteristics of books?"

Mr. MCNAMARA: I object to the question as immaterial.

A. I will answer by saying that I made some inquiry into the matter and later issued a citation to the publishers to show cause why the publication should not be denied the privileges of second class of mail matter.

Q. My question is intended to elicit information as to whether or not the complainants were informed that their right to second class rates was challenged on the ground that their publication had "all the characteristics of books?"

Mr. MCNAMARA: Same objection.

A. My recollection is that that was one of the grounds of the citation. I would like to add to my answer that I do not recall
318 the specific language of the citation, but it would be on the ground that it was not a newspaper or periodical within the meaning of the law which might cover the other proposition.

Q. Do you refer to your communication of May 17, 1907, addressed to the publishers of the Tip Top Weekly, annexed as an exhibit to the Bill of Complaint in this case? A. I refer to this and other citations of the publications that were treated at the same time.

Q. We call for the additional citations. A. If this case has direct application to the Tip Top Weekly, my answer is that this is the notice and citation referred to, and the only one in this case.

Q. Did you at any time call the attention of the complainants in this case to the contention in this letter of Mr. Cotterman's, that this publication had "all the characteristics of books," and for that reason was not entitled to be included in second class matter?

Mr. McNAMARA: The question is objected to as being immaterial. It is utterly immaterial what happened prior to the issuance of the citation, which is the basis of the proceedings in this case.

A. I will answer by quoting from the citation itself. (Wit-
319 ness here reads as follows:) "That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12, and 14 of the Act of Congress of March 3, 1879, (Ch. 180, 1 Supp., R. S. page 246), governing "mailable matter of the second class," but are in fact books, which, under Section 17 of said Act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

"Your answer, in writing, must be submitted on or before June 11, 1907.

"Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative."

Q. Did you at any time advise the complainants of the characteristics of periodicals it is claimed its publication lacked? A. At no time have I attempted to act as the legal adviser of the publisher.

Q. Do you consider that you would be acting as his legal adviser by giving specific notice of the characteristics of periodicals which they lacked, and would properly constitute second class matter?

Mr. McNAMARA: Same objection.

320 A. It would seem that that would be the case. I would not be required to give advice to the publisher under such circumstances.

Q. Did you consider that giving the complainants specific notice of the charge brought against their publication, of the character of that charge, would have been advising them legally?

Mr. McNAMARA: Same objection. The question is speculative.

A. (After question repeated to the witness.) It seems to me that that is putting the matter in rather a negative form, and I do not think that I would be required to advise the publisher as to what his publication lacked; but the citation asserted what the Department considered it actually was.

Q. You were aware were you not, that the Department had ruled years ago that the publications were entitled to the second class

rate, and that the complainants had been for many years expending their money and their energies on the faith of that ruling?

Mr. McNAMARA: Same objection.

A. It is a reasonable assumption that the Department may have so ruled at some time in the past, and likewise that it ruled in favor of certain other books, those published by the Houghton-Mifflin people, that were afterwards declared not to be second class mail matter.

321 Q. I am not trying to argue the legal proposition with you, but I am endeavoring to have you tell us what fair notice you consider that the Department gave these complainants of the specific defects in their publication, or the specific nature of the charge brought against them, under which after the lapse of so many years, the privilege once adjudicated to belong to them, was to be taken from them, with the consequent loss of the money and energy which they had invested in their business?

Mr. McNAMARA: That is objected to on the ground that it is immaterial, that the citation which was issued speaks for itself, and that the question seeks only to draw from the witness a personal characterization of something which is testimony in itself.

A. It seems to me that the question of counsel is so broad and sweeping and contains so much argument, that I should answer by saying that the decision of the Supreme Court in the Houghton and Mifflin case of itself constituted proper notice to all publishers of similar publications of their right to mail as second class.

Q. Do I understand that this is the extent of that notice you gave complainants in this case, and all the opportunities for hearing that were accorded them? A. The legal notice required by law was given them under date of May 17, 1907, and the hearing required by law was given on Tuesday June 11th following in this particular case.

322 Q. I believe you have already told us that this letter of May 17th, 1907, is the only suggestion, the only specification of the nature of that hearing?

Mr. McNAMARA: That is admitted.

Q. At what stage of the case, Mr. Lawshe, was this matter referred to the Assistant Attorney General? A. I would have to refresh my memory by reference to the record as to that.

Q. We will have to wait to have you do it then, because it is important to know that. In the citation of May 17, 1907, the statement is "that the issues of the Tip Top Weekly do not constitute a "newspaper or other periodical publication as required by sections "7, 10, 12 and 14 of the Act of Congress of March 3, 1879." What does constitute such a news-paper or periodical publication as in those requirements according to your holdings?

Mr. McNAMARA: We object on the ground that the witness is not compellable to interpret the law in this case, and has interpreted it so far as it applies to the ruling of exclusion of the publication involved in this suit, and the propriety of that interpretation is the subject of inquiry.

A. I would answer by quoting from the decision of the Supreme Court on the point.

Q. What decision do you refer to? A. The Houghton and Mifflin case.

323 Q. What characteristics of a newspaper periodical publication did you find the complainants' publication fail to possess?

Mr. McNAMARA: Same objection. Now that is objected to on the further ground that his decisions are not the subject of review by the courts. It is simply a question of whether or not the Postmaster General has given the hearing to the complainants and after made his decision.

Mr. DARLINGTON: We regard this question as most material.

A. I will avail myself of the privilege of declining to answer the question.

Q. In that case we will move to strike out all of the testimony of the witness that has been given. I think we are entitled to an answer.

Mr. McNAMARA: You can make that motion if you wish Mr. Darlington.

Mr. DARLINGTON: I prefer to have the answer. I submit it to counsel that these complainants could not have had a hearing upon the conditions under which the witness acted, unless those conditions were made known to the complainants. How can the court pass intelligently upon a question at the hearing, unless it knows what those conditions were.

324 Mr. McNAMARA: The court has before it the citation which was issued. It is admitted that that is the only notice that was given to the complainants. If that citation failed to indicate with sufficient clearness the charge against the publication, there is no notice and therefore no hearing within the meaning of the Act of 1901. But it is entirely another question when we come to see what was the character of the judgment rendered by this quasi-judge after proceedings had been properly initiated. That is something the court has nothing to do with, either by way of review, by qualification or by affirmance.

Mr. DARLINGTON: Suppose the fact to be that those books were ruled out because they lacked certain, as yet, undisclosed characteristics of periodicals, and that those specific lacks were never called to the complainants' attention and the complainants had never had a hearing upon them. Would not that condition of fact be material?

Mr. McNAMARA: You gauge that by your citation. If it is a question of fact or question of law as to whether or not the quasi-judge has made the mistake, I would like to see any authority that would say the court has jurisdiction to correct it.

Mr. DARLINGTON: The question here is, not whether the decision is correct, but whether the complainants have had notice of the objection.

325 A. (After previous question repeated.) In deciding upon what constitutes a periodical, I have been guided very largely

by the decisions of the courts, and notably the decision in what is known as the Houghton and Mifflin case. In that decision it was held that:

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors devoted either to general literature or some special branch of learning, or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel, or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such a- extensive range of subjects.

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential) but in the fact that it ordinarily contains a story, essay, or poem, or a collection of such, by the same
326 author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically; and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive when all their other characteristics are those of books rather than those of magazines."

Another court decision to which I will make reference is one rendered by Judge Crossfield, a Judge of the Court of Customs Appeals of the Philippine Islands. In passing upon a publication of a similar sort, he said:

"The best accepted definition of a periodical is a publication which is issued at regular and at stated intervals, and which contains matter on a variety of topics, and which does not of itself form a book.

"At least a portion of the publications in question as represented by the samples before the court, under no construction, in my opinion, could be termed periodicals. They are complete books. The rest, as represented by other samples, while having perhaps a greater appearance of being periodicals as generally understood, yet
327 they are nothing but novels published in that form. The statement that they are issued weekly, and that they have an

POOR COPY

annual subscription price, cannot make of them periodicals published at regular and stated intervals, and containing a variety of topics."

Q. Do I correctly interpret your answer to be that variety and continuity of subject-matter are the characteristics of newspapers or periodical publications, and that for lack of these your ruling in this case was made? A. I did not say so. My answer in the record speaks for itself.

Q. The decisions that you referred to Mr. Lawshe, as I understand your reading of them, embrace these two features, namely, variety of subject-matter, and continuity of subject-matter in the successive numbers. Was there anything else in them which constituted a cause for ejecting these publications? A. I do not believe the counsel is entitled to question me on the processes of reasoning by which I arrived at a certain conclusion.

Q. I am not trying to do that. A. It seems to me that is the nature of your inquiry.

Q. No; I am simply trying to find what our publications lacked?

Mr. McNAMARA: I will have to enter a positive objection to any further continuance of this line of examination.

Mr. DARLINGTON: Cannot we agree that your one objection shall apply to this whole line of examination?

328 Mr. McNAMARA: We can agree, but I cannot see how it is material as to whether or not there was a hearing provided for by the act.

Mr. DARLINGTON: These objections simply break the continuity if not the variety of the examination, and I am only suggesting that they may be under-stood to apply to everything in this line.

Continuing the Question: Mr. Lawshe, I want to disabuse your mind if it is abused, of any idea that I am trying to get at the sufficiency of your reasoning. I am simply endeavoring to get the particulars in which you held these publications were lacking in the characteristics of the newspapers or periodicals? A. It seems to me that that has been the import of your questions.

Q. I want you to tell us what are the lacking characteristics on the basis of which you ruled out this publication?

Mr. McNAMARA: That is objected to.

A. I do not think it is a proper question and I decline to answer.

Q. Did you at any time give notice to the complainants in this case that you regarded these publications as lacking the necessary variety of subject-matter in order to constitute a newspaper or periodical?

Mr. McNAMARA: That question has been asked three times.

329 Mr. DARLINGTON: It has not been asked at all.

Mr. McNAMARA: For the third time it is objected to.

(Question repeated to the fitness.)

A. I simply refer to the citation in the case.

Q. Did you at any time give the complainants notice that you regarded its publications as lacking in the necessary continuity of subject-matter to constitute a newspaper or periodical?

Mr. McNAMARA: The same objection.

A. I refer to the citation.

Q. Why can't you answer these questions Mr. Lawshe without referring to the citation? A. Because I think it is a sufficient answer.

Q. In so far as you know, did your Department through any of its officers give the complainants the information about which I am now asking?

Mr. McNAMARA: That is objected to.

(Mr. Lawshe here called for brief filed in the Tip Top Weekly inquiry.) A. What is the particular information about which you are now asking?

Q. Whether the complainants were given notice that lack of variety of subject-matter, or lack of the continuity of the subject-
330 matter, was being considered as the ground for excluding them from second class rates? A. I think that all of that would be covered by the citation itself.

Q. And do I understand that you neither gave nor caused to be given any other notice than the citation?

Mr. McNAMARA: That is stipulated and admitted on the record.

Mr. DARLINGTON: If Mr. McNamara admits that either in writing, or in the communications made to the representatives of the complainants when they came down here for the purpose of making argument, I will not pursue the matter further.

Mr. McNAMARA: It is admitted on the record that the citation is the only notice given to complainants in this case, and their answer was filed in the light of that notice.

Mr. DARLINGTON: Is it further admitted that when the complainants not only had put in a written answer, but also incurred the expense and trouble referred to in the citation for the purpose of a hearing, that no notice of either of the objections I have referred to was given to them, or their representatives?

Mr. McNAMARA: It is admitted that the complainants filed a printed brief and stated through their representatives that they did not care to say anything further, nor to present any further matter other than a small article called "The Influence of the Dime Novel," which was filed in the case and asked to be considered as a part of their defense.

Mr. DARLINGTON: When we need the assistance of counsel to help us make admissions on our side of the case, we will rigorously call for that assistance.

Q. At present I am inquiring whether, when the com-
331 plainants sent their representatives here for the express purpose of a hearing, they were given any notice of either of these two objections which now appear? A. I stand upon the record as to the propriety and fullness of my answer.

Q. Then I will have to put the question and proceed with the examination. I will ask you then, Mr. Lawshe, whether, in addition to the citation you either gave or caused to be given the com-

plainants or to their representative any notice that the lack of variety in the subject-matter or in the continuity of the subject-matter of its publications was being considered as a ground for its exclusion from the second class rates?

Mr. McNAMARA: The same objection.

A. It seems to me very clear that the publishers accepted the notice as covering the points about which inquiry is made, because they endeavored to cover them in the brief they filed in answer.

Q. If I can only get an argumentative answer to the question I am willing to let the case rest, insisting that the failure to answer directly is an admission that no such notice was given. A. I wish to say further that the publishers do not seem to have raised any point which the counsel now raises. Nor have they made any inquiry along the lines that the counsel now makes inquiries.

Q. Mr. Lawshe, before I leave this subject I will ask you to point out in the brief to which you referred, any discussion in it or reference in it to the continuity of the subject-matter. A. They
332 seem to cover the general ground of the Riverside Series. It has been a long time since I read this brief, but I read it at the time I passed upon the case very carefully.

Q. Did you yourself examine the Tip Top Series? A. I did.

Q. Can you tell us whether or not there is a continuity of subject matter in it? A. I could not say at this time as I have not examined the copy since the original case was passed upon.

Q. Do you or do you not recall that it is a series of adventures by the same character, and that if instead of being labeled Tip Top Weekly it had been labeled Adventures of Dick Merriwell, no such point as want of continuity would have been raised?

Mr. McNAMARA: That question is objected to.

A. I see no necessity for answering the question. I could conceive of separate stories of fiction about the same characters and having no real connection or continuity. You often have them of that kind.

Q. Did you find in this case a want of continuity? A. I am not now reviewing the decision in this case.

Q. I do not wish you to do so. But did you in any manner communicate to the complainant the fact that the question of continuity of its successive issues was a feature of consideration and about which it needed to be heard? A. I communicated to the publishers that the issues of the Tip Top Weekly did not appear
333 to constitute a newspaper or other periodical publication as required by the law; that they were in fact books; under section 17 of the Act of March 7, 1879.

Q. That was the only notice you either gave or caused to be given in any way of the subject matter of the hearing? A. I regarded it as sufficient notice.

Q. At what stage of this hearing was it that you invited the opinion of the Assistant Attorney General for the Post Office Department? A. My recollection is that after having issued the citation and having granted the hearing at which the publisher filed

certain briefs, I gave consideration to those briefs and also called upon the Assistant Attorney General for his legal judgment in the case, and that legal judgment was rendered under date of July 11, 1907, and the order of exclusion issued after that date.

Q. There was no hearing, then, accorded the complainants at the time or after the time of the reference to the Assistant Attorney General? A. The time of hearing had passed.

Mr. GLASSIE: You offered a copy of the Attorney General's opinion as part of your case, did you not?

Mr. MCNAMARA: No sir, we did not. It is mentioned in the bill as having been sent to the other side. It has not been produced. We will have a copy of it made and have it for use in the case if you desire it.

Mr. DARLINGTON: I find here a paper bearing date of July 11, 1907, entitled "Memorandum for the Third Assistant Postmaster General, and headed "Office of the Assistant Attorney General for the Post Office Department, Washington." Is this the opin-
334 ion furnished you by the Assistant Attorney General (handing same to Mr. Lawshe)?

A. Yes sir; an opinion of the Assistant Attorney General in connection with the particular case under inquiry.

Q. Is that his response to your reference to him of this case for his opinion? A. Yes, sir.

Q. Who is the officer designated as the Assistant Attorney General for the Post Office Department? A. Mr. R. P. Goodwin.

Q. By whom was he appointed? A. He was appointed by the Postmaster General.

Q. And his office is in the Post Office Department? A. Yes, sir.

Q. Taking a single illustration of this paper of July, 1901, I quote as follows: "From an advertisement before me, it seems to have been the purpose of the Magnet Detective Library to furnish to the world the writings of one 'Nicholas Carter,' and a personal examination of several of the numbers of that library shows that their contents consisted mainly of accounts of the exploits of 'Nick Carter,' the author and hero presumably being one and the same person. The same object is now attained throughout the medium of the publication called 'The New Nick Carter Weekly.' In order to give the Magnet Detective Library a touch of respectability the works of certain other authors were introduced. But an examination of the advertisements referred to shows that thirty-three out of a total of seventy-five books were the works of 'Nicholas Car-
335 ter,' for the most part narrating his personal experiences. The advertisement is worded 'Here is where you get your celebrated Nick Carter stories * * * 12 mo books, elegant covering.' Notwithstanding the fact that Messrs. Street & Smith filed a sworn bill in the Supreme Court of the District of Columbia alleging that the issues of the Magnet Detective Library were issues of periodicals, and not of books, they now, in flat contradiction of their statement under oath allege that the issues of this Library's series 'were prepared, bound, treated and considered as books.'" Can you tell us, Mr. Lawshe, where the advertisement here re-

ferred to was obtained, and how it came before either you or your Assistant Attorney General of the United States for the Post Office Department? A. I understood this inquiry to be with respect to the Tip Top Weekly, and you are making reference — a publication about which inquiry is not being made at this time. The opinion of the Assistant Attorney General was a collective one covering a number of publications. I have no information as to the source of the advertisement referred to, but it is probably a part of the record in the case.

Mr. McNAMARA: I object to the witness's testifying unless he knows.

A. I do not know.

Q. You are aware, are you not, Mr. Lawshe, that the Tip Top Weekly is a test case? A. I have had no such statement made to me, but I guess it is so.

336 Q. And all of them together were not referred separately to the Attorney General? A. They were collectively referred.

Q. Upon this opinion relating to all of them you excluded the Tip Top Weekly and the others? A. The opinion was only one factor in the case. It was simply advisory.

Q. But the opinion was upon all of them? A. The opinion itself covered all and made reference to all of the publications.

Q. Were the complainants advised of these charges made against them in this opinion or given any opportunity for answering these charges of fact?

Mr. McNAMARA: Objected to.

A. To what charges?

Q. That they were endeavoring to attain the same object through the 'Nick Carter Weekly' that they had started to attain from the Magnet Detective Library, that to give the Magnet Detective Library an air of respectability the works of other authors were introduced; that the complainants had sworn in court that the issues of the Magnet Detective Library were issues of periodicals, and that they advertised them, not as periodicals, but as books. Were they given any notice that these charges coming from the Attorney General, not in regard to matters of law, but in regard to facts, were before you? A. Mr. Darlington, that opinion of the Attorney General is offered purely from a legal standpoint.

Q. I am not asking how you consider it

337 Mr. McNAMARA: I object to the question. There was no charge mentioned in that opinion. There was simply an elaboration of a point of view in respect to the legal aspects of the question, for which his opinion was asked.

Mr. DARLINGTON:

Q. There appeared here a series of most injurious allegations of fact against these parties before you for judgment, and bearing upon the question whether or not they should be excluded from the use

of the second class rate privileges. I am asking whether these allegations, not of law, for which you say the matter was referred to the Attorney General, but of fact, were ever brought to their attention, or if they were given any opportunity to defend themselves against the charges, or to repel the inferences sought to be adduced by them by the Assistant Attorney General? A. I could not answer that except in this way: that they filed a brief covering the character of the publications—voluntarily filed such a brief or statement.

Q. What has that got to do with whether they were given an opportunity to meet these allegations of fact against them? A. I would answer you by asking the question, what has this particular thing got to do with it?

Q. With what? A. You are endeavoring, it seems to me, to inject charges into the record that I never considered as charges.

Q. What did you consider a charge. A. A mere recital; that is all.

Q. A recital of facts? A. Not necessarily a recital, but the things brought to his attention.

:338 Q. Of which the complainant had no notice? A. I did not say so.

Q. Is that correct? A. I do not know. I have no knowledge that he had particular notice of that particular thing.

Q. That is all.

Redirect examination.

By Mr. McNAMARA:

Q. Mr. Lawshe, did you refer this matter to the Assistant Attorney General for the Post Office Department to obtain his opinion upon the legal points of the case? A. That was all.

Q. Mr. Darlington has invited your attention to certain alleged charges of facts or statements of facts in the opinion of the Assistant Attorney General. I will ask you if they were considered further than as illustrations of the views expressed in his opinion?

Mr. DARLINGTON: I object.

A. I answered that a few minutes ago.

Q. I believe that you stated, Mr. Lawshe, that you read and considered the brief or the statement filed by the publishers of Tip Top Weekly. A. I did.

Q. Did you also consider the other publication which they asked to have considered? I think it was the article on "The influence of the Dime Novel at the Present Day." A. I did.

Q. At the time of hearing? A. I did.

:339 Q. You testified, did you not, that you collaborated in this matter with Mr. Bacon, the Superintendent of Classification? A. I did.

Q. Did you specify the date when you called upon the Assistant Attorney General for his opinion? A. I could not give the precise date. It was after the date of the hearing, however. It was following that date. I wanted legal advice on certain matters.

Q. Now, just a question or so upon another matter. You were

asked some questions at the beginning of the examination—your cross-examination, with respect to any previous experience you had in your knowledge of post office matters, as, for instance, second class and third class mail matters.

Mr. DARLINGTON: I have asked no such questions.

Mr. MCNAMARA: Well, the record there suggests it. Your questions there are inferential.

Mr. DARLINGTON: I object to that as being immaterial.

Mr. LAWSHE: I think at the previous hearing the counsel presumed I had had no previous connection with the question.

Mr. GLASSIE: "Official connection" were the words used.

Q. Prior to your incumbency in this position of Third Assistant Postmaster General have you had any connection with the question about the right to enjoy second class rate privileges? A. I have had, in two capacities; one as the publisher of a newspaper enjoy-
340 ing second class mailing privileges, and also as postmaster.

Mr. DARLINGTON: That goes under our objection.

Mr. MCNAMARA: The stenographer will please note that our question is asked in the words of the question of Mr. Darlington at the opening of the cross-examination.

Mr. DARLINGTON: The objection is doubly tenable.

Mr. MCNAMARA: Mr. Lawshe, I think your task is over.

Recross-examination.

By Mr. DARLINGTON:

Q. Was this reference to the Assistant Attorney General oral or in writing? A. I could not say. Sometimes I dictate memorandums and sometimes I make oral requests.

Q. If it is in writing will you have a copy of it made? A. I will.

Q. Why was it referred to the Assistant Attorney General? A. Is the Third Assistant Postmaster General required to give a reason for everything he may do in order that he may perform the functions devolving upon him by law and his legal duty as Third Assistant Postmaster General?

Q. The legal aspects were put before him? A. Certainly.

Q. You are not yourself a lawyer? A. Not admitted to the bar.

Mr. MCNAMARA: I do not understand that you are bound by his legal advice. You are free to accept or reject it.

Mr. LAWSHE: No, I am not bound by it. I have rejected it on several occasions.

A. L. LAWSHE.

Subscribed and sworn to before me this 5th day of February, 1909.

FRANK D. BLACKISTONE,
Examiner.

341 HARWOOD M. BACON, recalled on behalf of the defendants, and duly cautioned as previously sworn, testified as follows:

Mr. MCNAMARA: I am continuing Mr. Bacon for a little re-direct examination. There is a point here wherein he wants to make himself understood. The record does not clearly express what he said.

Q. Mr. Bacon, I have previously asked you about the dates of Mr. Heines' calls at your office. Do you recall those dates? A. Yes, sir, I recall them as June 10th and 11th.

Q. Did he call on the 12th? A. Not to my knowledge.

Q. Was he in your office on the 12th? A. Not that I recall.

Q. Was he there? A. He was on the 10th and 11th.

Q. And on the 12th? A. No, sir.

Q. You have testified, Mr. Bacon, that you had before you the printed answer of the publishers to the citation. A. That was on the day of June 11th.

Q. That was the evidence sought for the hearing, was it not, in one of the cases? A. Yes, sir.

Q. You were asked in re-direct examination if on the occasion of Mr. Heines' visit you asked him any questions. What is your recollection as to that? A. That Mr. Heiney was given an opportunity to make any statement he cared to make and did not seem disposed to make any statement of the matter other than to present

342 this little pamphlet "The Influence of the Dime Novel" and the briefs which he filed.

Q. Did he say anything to you at all in addition to requesting you to consider the pamphlet "The Influence of the Dime Novel"? A. No, sir.

Q. On the 12th of June, the day set for the hearing in the citation of the case of Work and Win, was anything done by the publishers or any appearance made by them other than filing their printed brief. A. Not before me.

Q. I think that is all.

Cross-examination.

By Mr. DARLINGTON:

Q. Do I understand, Mr. Bacon, that June 12th was set for the hearing of this case? A. As I recall it, yes sir.

Q. Who set it? A. You mean in this particular case?

Q. They are all together. A. The Third Assistant Postmaster General.

Q. Was that in writing? A. Yes, sir.

Q. What writing was it? A. Typewriting.

Q. What writing contained it? A. The citation.

Q. Let me show you the citation (handing same to witness). I will ask you if you are not mistaken about that? A. In what respect?

343 Q. I hand you the citation of May 17th and ask you to point out what there is in it about a hearing on the 12th. A. I am not referring to those particular cases, but there were hearings in this or a similar case on the 12th as well as on the 11th.

Q. We are now trying to get at the notice given the complainant that there would be a hearing on the 12th. Where is it? A. It would probably be filed in one of the other cases.

Q. This Tip Top citation is here on the 11th, is it not? A. Yes, sir.

Q. And the representative of the complainant was at your office on that date? A. Yes, sir.

Q. What, if anything, was said to him about a hearing on the next day? A. I do not believe anything was said to him in regard to a hearing on the following day.

Q. How are you enabled to say that this representative of the complainant was not at your office on the 12th? A. To the best of my recollection.

Q. You do not recall his being there at that time? A. Had he been there I am quite sure I would have remembered it.

Q. How long ago was this? A. In June 1907.

Q. What makes you think you would have remembered it—how many days a man would call on you on a matter of that sort
344 so long ago? A. It is a matter of custom to make a note of a call of a representative of a publisher. In this particular case none was made by us on the 12th.

Q. Is that your custom? A. Substantially so. An exception rarely, if ever, occurs.

Q. What occurred on the 11th between you and the representative? A. As I recall it, Mr. Heines appeared and I asked him whether he had anything in particular to say, and he expressed no inclination or desire to say anything other than the filing of the printed briefs, together with copies of the publication, and asked that consideration be given to this little pamphlet entitled "The Influence of the Dime Novel."

Q. Instead of telling us what he did not express, what did he express? A. He expressed a desire to have that considered in addition to the printed statement appearing in the brief.

Q. That is what he said? A. Yes, sir.

Q. Your statement that he expressed no desire to be heard or no desire for any further opportunity to be heard is simply your inference from the fact that this is all he said? A. No, sir. If he had expressed a desire or shown any inclination he would have been heard. That is the universal custom.

Q. You have not got my question, I think. You testified, I think, more than once, that he expressed no desire for any opportun-
345 ity to be heard. I am asking you if that is simply your way of putting the fact that what he said was he would like to have you consider that pamphlet? A. Yes, sir; that is what he said to me.

Q. And the rest of it was simply your inference of the fact from what he said? A. Yes, sir.

Q. Did Mr. Heines indicate any indisposition to discuss the case with you? A. He indicated no disposition to discuss it.

Q. Now let me repeat it. Did he indicate any indisposition? A. He did not say he would not discuss it.

Q. Did he in any manner indicate any indisposition to discuss

it with you? A. Except that he did not make any effort to discuss it.

Q. Your language is a habit. Mr. Bacon, did Mr. Heines show any indisposition to make a statement on the subject? A. He did not make any statement.

Q. That is the fact, and the balance is your way of putting it? A. Yes, sir.

Q. Had you read his statement at that time? A. Yes, sir.

Q. Did you ask him any questions? A. No, sir.

Q. Did you call his attention to the fact that the continuity of the subject matter of his publications was under consideration? A. I did not discuss the case with him other than as stated.

346 Q. You gave him no specific information as to what the objection was? A. I did not discuss the case with him.

Q. Can not you answer my question more directly? A. I have answered your question.

Q. You have no feeling about this case, have you? A. Absolutely none.

Q. Why then can't you state whether or not you directed his attention to any of the objections that your Department was entertaining to his publication. A. I did not discuss the case with him.

Q. Why not? A. He showed no desire for it and I did not attempt to discuss it with him.

Q. You stated that you were charged with the duty in connection with your chief of rendering a decision which would vitally affect the interests of the complainants, did you not? A. I was not charged with the duty of rendering a decision.

Q. Or aiding in its consideration? A. It was my duty to aid in considering the case.

Q. And you did not think it incumbent upon you or upon the Department to let these people know what your objections were to their publication?

Mr. McNAMARA: I object to that, because it has not been stated that he had any objections. I do not want counsel to be unconsciously unfair to a witness.

Mr. DARLINGTON: We will give him the benefit of that suggestion.

347 Q. What part did you take in the consideration of the cases? A. Carefully going over the papers prior to sending them up to Mr. Lawshe. When they were before him I also discussed the case with him.

Q. What had you done in the matter, if anything, prior to your interview with Mr. Heines. A. The routine matters in regard to preparing the case for citation had been under my charge.

Q. In the course of that preparation of these preliminary matters did you familiarize yourself, or were you yourself familiar with the objections to the continuance of second class rates to these publications? A. I was, because the citation had been prepared in my division and under my direction.

Q. You knew at the time of the interview with Mr. Heines what objections the Department was considering against continuing these second class rates? A. Yes, sir.

Q. And you knew that Mr. Heiney had come down from New York for the purpose of representing the complainants before you, and did not call his attention to any of these objections? A. The citation of the Third Assistant Postmaster General——

Q. When he came down personally and appeared personally before you in this connection, you did not call his attention to the particular points of objection you had? A. There was no necessity.

Q. I am not asking you as to necessity. I am asking you what occurred. A. I did not; no, sir.

Q. That is all.

348 Redirect examination.

By Mr. McNAMARA:

Q. Mr. Bacon, did Mr. Heines say he wanted to file any other paper or make any speech or argument before you about the date of the hearing? A. None whatever.

Q. Now you were asked if your rule to make notes of appearances of people at the dates of those hearings had any exception to it. I will ask you if an exception took place in this case?

Mr. DARLINGTON: I object.

A. It did not.

Mr. DARLINGTON: The witness twice stated on his direct examination that he could not recall, and it was only the third time that he came out positively with the statement that he did not remember.

Q. Mr. Bacon, I am not clear as to these different objections, with respect to whether Mr. Heiney called on the 12th or not. I will ask you as to your best recollection whether he did call on the 12th or not? A. He did not.

Q. You were asked as to whether your testimony as to the lack of disposition on his part to talk of things of that kind, was a matter of inference on your part. I do not want inference; I want the fact. Did he, or did he not say anything to you? A. He did not.

Q. I will ask one question further. In the discharge of your duties here as Superintendent of the Classification in the matter of these hearings, I will ask you if that rule to note appearances is a permanent rule? A. It is.

349 Q. It is an unvarying rule?

Mr. DARLINGTON: I object. It is a very leading question.

Mr. McNAMARA: That is as far as I desire to go, and if that suits you we will have the case calendared tomorrow.

Mr. GLASSIE: We may desire to rebut.

HARWOOD M. BACON.

Subscribed and sworn to before me this 5th day of February, 1909.

FRANK D. BLACKISTONE,
Examiner in Chancery.

Mr. McNAMARA: I announce the testimony on behalf of defendants closed.

350 *Testimony in Rebuttal.*

Filed March 31, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH and CORA A. GOULD, Trading under the Firm Name and Style of Street & Smith,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States.

WASHINGTON, D. C., *March* 5, 1909—2:30 o'clock p. m.

Appearances:

Present on behalf of the complainants: Henry H. Glassie, Esq.

Present on behalf of the defendants: Stuart McNamara, Esq.; Thomas H. Netherland, Esq.

Met pursuant to notice at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Whereupon WILLIAM H. HEINES, a witness on behalf of the complainant, called in rebuttal, and being first duly sworn, testified as follows:

Direct examination.

By Mr. GLASSIE:

Q. At the last session of testimony when you were not present, Mr. Heines, Mr. Bacon, Superintendent of Classification of the Post Office Department, testified, page 91, as follows:

"That Mr. Heines was given an opportunity to make any statement he cared to make and did not seem disposed to make any statement of the matter other than to present this little pamphlet 'The Influence of the Dime Novel,' and the briefs which he filed."

351 What is the fact about that, Mr. Heines? A. I gave Mr. Bacon every opportunity. In fact I tried to draw him out. I called on the 10th of June, which was Monday, the day before the notice for response, with my briefs and handed them to Mr. Lawshe's Secretary, Mr. Due, I think his name is, and left them, saying that I would call back the following day at 2 p. m. for a hearing. The next day I went before 2 o'clock and saw the same gentleman upstairs and asked to see Mr. Lawshe and to tell him that I was there by appointment.

Mr. MCNAMARA: I object to this answer as not responsive to the question. We do not want the history of it.

Mr. GLASSIE: You can go on since you have got that far and say exactly what you think of.

Mr. MCNAMARA: I must enter my objection on the ground that the whole matter is covered fully in the witness's direct testimony.

Mr. GLASSIE: Are you objecting to the answer or to the question?

Mr. MCNAMARA: I am objecting to the invitation you extended to cover the whole ground once more.

Mr. GLASSIE: There is no invitation. I do not want this witness's testimony broken up by a lot of colloquy between counsel. I asked him a question. Did you object to it?

Mr. MCNAMARA: My objections are on the record.

Mr. GLASSIE: Did you object to the question?

Mr. MCNAMARA: I do not object to the question.

Mr. GLASSIE: Answer the question, Mr. Heines.

A. Well, I called on June 11th and was told to go down stairs with the colored porter to see a Mr. Bacon. And I went down and saw Mr. Bacon and asked him if he had read the brief that I left there the day before. He said he had. And I asked him if he
352 had anything to say about it. He said, no. Then I asked him if that was customary or if it was the custom. He said usually they gave some questions to answer. But in this case they did not. I told him I had come a long way to get a hearing, and he had nothing to say.

Q. Where was Mr. Bacon during this interview? A. He was in his office and standing alongside of his desk. I would say that I was separated from him by a railing; that is my impression at this time. He was standing before his desk and I was a few feet from him.

Q. Did he ask you to sit down? A. No, sir.

Q. Who opened the conversation, you or Mr. Bacon? A. I introduced myself to Mr. Bacon.

Q. After having left the brief or answer with the Department on the 10th why did you go back on the 11th? A. To get a hearing and to see if they had anything to say in answer to the brief I left on the 10th.

Q. Why didn't you mail that brief from New York? A. Well, I wanted to get a hearing to see what they had to say about it. I wanted to come down and leave the brief and get their answer and see what they had to say about it. I left the brief the day before to give them an opportunity to read it.

Q. How many times were you in Mr. Bacon's office on the 11th? A. Twice.

Q. After this conversation that you have just testified to with Mr. Bacon, where did you go? A. I went back upstairs to the office of the Third Assistant Postmaster General, expecting that he would be at leisure to give me a hearing.

353 Q. Did anybody say to you that the Third Assistant Postmaster General would not hold this hearing himself? A. No, sir. On the contrary I expected him to do so all the time. I did not recognize Mr. Bacon.

Mr. MCNAMARA: I object to that answer, except the first part of it in which he answers the question.

A. I did not recognize Mr. Bacon because I was not told that he was to give me a hearing.

Q. Did Mr. Bacon tell you that he was to conduct the hearing? A. No, he did not.

Q. Did you have any intimation of any sort from anybody in the Department that the Third Assistant Postmaster General was not to conduct the hearing and that Mr. Bacon was? A. No. After the first call on Mr. Bacon I went back to the office of the Third Assistant Postmaster General expecting that he would then be at leisure to give me a hearing.

Q. What was the answer you got? A. From whom?

Q. When you went back to the office of the Third Assistant Postmaster General? A. That he was engaged.

Q. After that what did you do? A. Then I got my hat and coat, seeing that there was nothing to be had by waiting there, and went back to Mr. Bacon's office.

Q. Where were your hat and coat during the time you were in Mr. Bacon's office? A. In the outer office of Mr. Lawshe.

354 Q. You left them there when you went down the first time? A. Yes, sir.

Q. Mr. Due, the clerk of the Third Assistant Postmaster General, said at one of the sessions of testimony on page 22 in answer to the question "Did this man (referring to you) come back", as follows: "No, sir; he did not." Again on page 26, (referring to you) in response to the question "Well, did he return at all," he answered "Not that I remember." Will you state what is the fact about that? A. Why I had to go back the second time to get my coat, and then it was when I asked if Mr. Lawshe was engaged, that he said he was still engaged, and then I left him my address at the Willard.

Q. When was it that you left your address with Mr. Due? A. The second time on June 11th.

Q. After your second interview with Mr. Due where did you go and what did you do? A. I went back to Mr. Bacon's office and handed him that little pamphlet and asked if he would incorporate that in the brief I left yesterday. There was nobody upstairs to receive it and I asked him to put me on record then as having called up there, and he called a stenographer and did so.

Q. Where was this pamphlet during your first interview with Mr. Bacon? A. In my overcoat pocket.

Q. During which one of your interviews with Mr. Bacon did you ask him to put you down as having called? A. My second and last call.

Q. Did Mr. Bacon ask you whether you had any verbal

355 statement to make? A. No, sir. In fact I tried to draw him out. He told me he did not have anything to say to me.

Q. Did Mr. Bacon ask you whether you had anything in particular to say? A. No, sir; he did not ask me anything bearing on the case at all.

Q. Will you state whether he told you voluntarily that he had read the brief or answer, or whether you asked him if he had read it? A. I asked him if he had read the brief or answer that I left yesterday. He said that he had.

Q. He said that he had? A. Yes, sir.

Q. Did Mr. Bacon say anything to you at either of these interviews

on the 11th of June about continuity of the subject-matter in reference to your publication? A. He did not have anything to say on the case at all.

Q. Then did he say anything about variety of literary matters? A. No sir, he would not talk on the case.

Q. What ground did he say the Department relied upon for the exclusion of these publications?

Mr. McNAMARA: The question is objected to on the ground that the reasons and grounds of the Department were stated in the citation.

A. He did not have anything to say bearing on the case at all.

Q. Was anything said to you by Mr. Bacon or Mr. Due
356 or anybody in the Post Office Department about any reference of this matter to the Assistant Attorney General? A. No, sir.

Q. When, in fact, did you first hear that there had been such reference to the Assistant Attorney General? A. I do not really understand that question.

Q. When was it brought to your attention that the Third Assistant Postmaster General had obtained some sort of an opinion from the Assistant Attorney General about these publications? A. Oh, sometime after my call there. I could not recall the date.

Q. Did you have any interview with the Assistant Attorney General? A. No, sir.

Q. Were you ever called upon to appear before him? A. Only in that case.

Q. Well, in connection with this case were you ever called upon to appear before the Assistant Attorney General? A. We were cited to appear.

Q. I am referring to the Assistant Attorney General. A. Oh, I thought it was the Postmaster General. No, sir.

Q. Did you receive any direction by letter asking you to appear before the Assistant Attorney General? A. No, sir.

357 Cross-examination.

By Mr. McNAMARA:

Q. Mr. Heines, are you an attorney? A. No, sir.

Q. You are employed by the firm of Street and Smith, I believe? A. Yes, sir.

Q. Have you any connection with the Frank Tousey Company? A. No, sir; only as their representative.

Q. I understood that you represented that company as well as Street & Smith? A. In this case only.

Q. And that is not a permanent connection with the Frank Tousey Company? A. No, sir.

Q. You came to Washington on June 9th? A. Yes, sir; Sunday.

Q. And on the following day June 10th you appeared at the Post Office Department? A. Yes, sir.

Q. Did you prepare this response or answer of the Street Smith and Frank Tousey Companies? A. Yes, sir; with assistan
Q. The assistance of whom? A. Is it necessary to answer th

Mr. GLASSIE: You may answer.

A. Mr. Madden.
Q. He is one of the writers of stories, I believe? A. No, didn't have anything to do with the writing of stories; he hel prepare the brief.
358 Q. He is employed by the firm of Street & Smith? Only for that case.
Q. Is he a lawyer? A. I do not know.
Q. What is his business? A. I do not know.
Q. Did he prepare the major part of that answer or brief? Well, we worked together on that.
Q. Then you are familiar with the contents of that answer? Yes, sir.
Q. Now, besides that answer you also brought with you a li pamphlet or brochure called "The General Description of the fluence and Character of the Present-day Dime Novel?" A. sir.
Q. Did you testify that you had that in your overcoat poc A. I testified that I had it in my coat pocket and that I hande to Mr. Bacon.
Q. Those were the only two papers you filed? A. Yes, sir.
Q. Did you offer to file any other papers? A. No, sir.
Q. Did you ask if you might file any other papers? A. No.
Q. Did you have any other papers you wanted to file? A. sir.
Q. No one came down with you from New York on this case they? A. No sir. I had my family with me.
359 Q. Nobody to appear before the Department? A. sir.
Q. You were the only person in behalf of both parties? A. sir.
Q. And this answer or brief in behalf of the Street & Smith C pany and the Frank Tousey Company you prepared with a ance, as you say, and filed with the Department?

Mr. GLASSIE: I object to the question as being a résumé.

Q. And then you also asked that they consider this little pa let on "The Influence of the Present-day Dime Novel?" A. sir.
Q. Now, you said that when you appeared before Mr. Bacon he would not talk on the case? A. Yes, sir, I said that.
Q. Did he say that he would not talk? A. I asked him i had anything to say, and he said no that he did not have anyt to say on the subject.
Q. Did he tell you he would not hear you on the subject? A said he had nothing to say.
Q. You are not answering my question. Did he say tha would not hear you on the subject?

Mr. GLASSIE: You meant to say that he used the words "I will not hear you?"

Mr. MCNAMARA: Yes, sir.

Mr. GLASSIE: We object to that.

A. He said he had nothing to say.

Q. Did he say he would not hear anything you had to say? A. Not in that language.

Q. Or any language like that? A. He gave me to infer——

Q. Let us leave inferences and impressions out. Did
360 he use any language whose real or proper meaning was that he would not hear anything you had to say? A. He said he had nothing to say.

Q. That is your best answer to my question? A. That is my best answer.

Q. You say you tried to draw him out. What do you mean by that? A. By asking him if he had read the brief that I left with him the day before and if he had anything to say on it.

Q. And that was trying to draw him out? A. Yes, sir.

Q. Did he compliment you on the brief? A. I do not remember.

Q. Didn't he say it was very full? A. He may have said that—very well done, or something like that.

Q. Is it not a fact that he said that the brief covered the case very well? A. He may have said that.

Q. You asked him then to accept this little pamphlet? A. Yes, sir.

Q. What did he say as to that? A. He said yes.

Q. He did not show any disinclination to receive that pamphlet? A. No, sir. I asked him if he would have that incorporated with the brief I left the day before, and he said he would do so.

Q. At the time you made that request to file this additional pamphlet did you ask him if you might be heard to argue the
361 case orally? A. I asked him to put me on record as having called.

Q. And he said he would do so? A. Yes, sir; which he did.

Q. Now the second day you called, which was Tuesday, you met the clerk in the office of the Third Assistant Postmaster General? A. Yes, sir.

Q. Did that clerk say to you that the party you wished to see was downstairs? A. No. He says "You are to see Mr. Bacon."

Q. That is the language he used? A. Something to that effect.

Q. And then it was that he took you downstairs? A. That he turned me over to one of the porters.

Q. Did you notice whether that porter had a card in his hand? A. No, sir, I did not.

Q. You returned to New York on the evening of the 11th? A. Yes, sir.

Q. You did not wait for him on the 12th, the following day, did you? A. No; there was no inclination on the 11th to give me a hearing and I did not see any reason for waiting over.

Q. And that is the reason you went, although you knew you were

cited to appear on the 12th? A. For the Frank Tousey Company, yes, sir.

Q. You did not call back on the morning of the 12th to ask for a hearing in that case? A. No, sir.

Q. As a matter of fact you had filed your pamphlet and brief in response to the Frank Tousey Company? A. On the 10th, yes, sir.

362 Q. So you really had delivered to them what you in behalf of the Frank Tousey Company had to say in response to the citation? A. Well, I was there to represent both parties and to get a hearing on the 12th for both parties.

Q. But you had already delivered to them the answer of the company to that rule?

Mr. GLASSIE: I object. He has already said that he submitted it in advance of the day set for hearing in order that the Government might have the benefit of examining it in advance of the hearing. It has been testified to several times.

Q. At the time you left the Post Office Department on the 11th, did you have any other paper which you desired to file in behalf of either of the parties? A. No, sir.

Q. You testified that sometime after your call you learned that the matter of these cases had been referred to the Assistant Attorney General? A. Yes, sir.

Q. Do you remember how long after your call it was? A. I could not recall that.

Q. Do you remember from whom you learned it? A. As I remember it I received a communication.

Q. Was not that the communication of exclusion from the second-class privilege? A. Yes, sir; I believe it was.

Q. And did that contain a copy of the opinion of the Assistant Attorney General? A. Well, I could not answer that off-hand.

Q. You have not seen that, have you? A. I have not seen it.

363 Mr. GLASSIE: It is admitted of record by counsel for complainants that the order of exclusion was received after the reference to the Assistant Attorney General, and that a copy of his opinion accompanied the order of exclusion; and that that was the first notice that complainants received of there having been such reference.

Mr. MCNAMARA: I do not think that is a necessary admission.

Q. You prepared that answer very carefully, did you not? A. Yes, sir.

Q. I think that is all.

Redirect examination.

By Mr. GLASSIE:

Q. When you prepared that answer, Mr. Heines, had you received

Q. Why did you not mail that answer from New York? A. Because we wanted to have a hearing outside of that. We did not know whether that answer would cover their objections.

Q. When you had your interviews with Mr. Bacon did he say that the Department had any objection to the publications which had not been fully answered by your response? A. No, sir; he did not dwell on the subject at all.

Q. Did he say to you anything or intimate to you anything to the effect that the brief or answer which you had filed the day before was not satisfactory answer to the citation? A. No, sir.

364 Q. How long have you been employed by the firm of Street & Smith? A. Close to twenty years.

Q. What do you know about the Tip Top Weekly—the publication of it?

Mr. McNAMARA: I object to that question.

Mr. GLASSIE: State your objection.

Mr. McNAMARA: That this is a matter that has been covered so far as the publication can be material in the direct testimony of this witness.

Mr. GLASSIE: I remind counsel that he asked this witness on cross-examination what he could have said in addition to what was in that printed brief.

Mr. McNAMARA: I asked no such question.

Mr. GLASSIE: Whether he had not embodied all that he could say on behalf of his publication in that printed brief.

Mr. McNAMARA: All that he desired to say—I think it was.

Q. Now, Mr. Heines, you were asked the question—just what do you know about the Tip Top Weekly and the publication of it? What is the extent of your knowledge in reference to that publication? A. As a periodical issued at certain dates?

Q. I do not mean to ask you what it is, but what is the extent of your acquaintance and knowledge; what do you know about it? A. Well, I have been with it ever since it has been alive, and it has always been recognized as a regular publication.

Q. How well acquainted are you with the publication, its contents, mode of issue and all that sort of thing? A. I know all about it.

365 Q. Is there anybody who knows any more about it than you do? A. No one except the editor.

Q. Are you acquainted with its make-up? A. Yes, sir.

Q. Are you acquainted with its contents? A. Yes, sir.

Q. Are you acquainted with the way it is printed and published? A. Yes, sir.

Q. Are you acquainted with the way it is circulated? A. Yes, sir.

Q. Is there anything about that publication that you do not know? A. I don't believe there is anything.

Recross-examination.

By Mr. McNAMARA:

Q. Mr. Heines, on the 11th of June, the second call you made, what did you have to say or desire to say in addition to what you had said in the printed answer? A. Well, I was trying to find out what their objection was so as to be able to answer it.

366 Q. Did you have anything in mind that you wanted to say besides what was contained in the answer? A. The questions they would ask me would bring up something.

Q. Was there anything in your mind that you desired to say other than what you had incorporated in your answer? A. No, sir.

Q. So that you had nothing at all that you thought you wanted to say?

Mr. GLASSIE: I object to that question as to what he thought he wanted to say.

Mr. McNAMARA: That objection is very true from a lawyer's standpoint.

A. I do not think I can answer that question.

Q. Your complaint is that they did not ask you any questions, is it not? A. Yes, sir.

Q. In other words, you felt that because you were not asked questions you did not get a hearing? A. Yes, sir.

Q. That is your view of it? A. Yes, sir.

Q. Do I understand that you were unable to say anything further than what was put in that brief except it be in answer to some questions they might ask? A. Our people would answer any question they might ask as we wanted to find out the reasons they had for preventing our use of the second class privileges.

Q. You wrote the brief, did you not? A. Yes, sir.

Q. And you knew all the reasons which appeared in the citation? A. Yes, sir; but I thought they might have something further to say—some more reasons.

367 Q. Is that what you complain about now? A. We wanted to hear what more they had to say about it.

Q. I understand that you nevertheless have said to them what you wish to say in response to the charges in the citation? A. Yes, sir.

Q. But you thought they might have some more questions, and you wanted them to ask you questions?

Mr. GLASSIE: I object to the question because it assumes that the citation, which is a bare statement of conclusion of law, presents specific objections to the publication.

Mr. McNAMARA: If you care to moot the invalidity of the citation that is up to you when the case comes on for hearing. But that is a matter that is immaterial now.

Q. Do I understand that you supposed that the Department had some other objection besides the one stated in the citation, and you desired them to ask you questions so that you might answer them?

A. After hearing our brief, I thought they would have some questions to ask me then.

Q. Your complaint is that you did not have these questions put to you? A. Yes, sir.

Q. That is all.

Mr. GLASSIE: Have you got a copy of the citation?

Mr. MCNAMARA: Not here with me.

368 Re-redirect examination.

By Mr. GLASSIE:

Q. I will ask you to look at a copy of the citation of May 17th annexed to the original bill and point out, if you can, any objection to this publication except the general objection that it is not a periodical but is a book.

Mr. MCNAMARA: I object to the question on the ground that the citation speaks for itself and is a matter of record.

A. "That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879, (Ch. 180-1 Supp. R. S., Page 246) governing mailable matter of the second class, but are in fact books, which, under Section 17 of said Act are third class matter charg-able when sent in the mails at the rate fixed by law for that class of mail matter."

Q. That is the objection you had from the Department and which is mentioned right there in that citation? A. Yes, sir.

Q. And that is what you had before you when you made your answer? A. Yes, sir.

Q. If you had been asked about the circulation of the paper were you qualified to reply? A. Yes, sir.

Q. If you had been asked about the literary matter in it would you have been qualified to reply?

Mr. MCNAMARA: That is objected to. The witness has testified that he knows everything about it; that there was not a thing he did not know.

A. I would, yes, sir.

369 Q. You filed these briefs or answers on the 10th. Why did you go back on the 11th? A. To hear what they had to say after reading the briefs.

Q. That is all.

WILLIAM H. HEINES,
By THE EXAMINER.

It is stipulated by and between counsel for the respective parties herein that the examiner may sign the name of the Witness, W. H. Heines, to his deposition, and that said deposition may be read in evidence with the same force and effect as if signed by said witness.

Mr. GLASSIE: I want to ask the counsel for the Government to produce for the convenience of the court, because I believe the court will take judicial notice of them—the rules and regulations

upon which the Department was acting at the time that this citation was issued, and the form of application for admission which was in use by the Department when these publications were admitted, the Government being the only person who can of course supply us with authentic copies of these documents.

370 In the Supreme Court of the District of Columbia.

Equity. No. 27279.

STREET & SMITH et al., Complainants.
vs.
VON L. MEYER, Postmaster General, Defendant.

WASHINGTON, D. C., *March* 29, 1909—4 o'clock p. m.

Met pursuant to notice and agreement at the office of Henry H. Glassie, Esq., Colorado Building, Washington, D. C.

Present on behalf of complainants, Henry H. Glassie, Esq.; present on behalf of the defendant, Stuart McNamara, Esq.; present also the Examiner.

By Mr. GLASSIE: In continuation of the previous offers of exhibits showing that the exclusion of complainants' periodical is purely arbitrary, and especially in rebuttal of the testimony of the witness Z. N. Copp in respect of moral influences and the like, we desire to offer a copy of the following publication regularly entered by the Postoffice Department as second class matter since the institution of this suit, and now being transported as such:

Westbrook's Fun Book Stung, Vol 1, March, 1909, No. 5, Marked "Complainants' Exhibit in rebuttal."

370½ By Mr. MCNAMARA: To the admission of which evidence counsel for the defendant objects on the ground that the same is immaterial, and on the further ground that it is none the less the duty of the defendant to exclude the publications of complainants notwithstanding there are other publications which, upon examination, may be found also deserving of exclusion.

By Mr. GLASSIE: Have you been able to produce the rules and regulations and other printed matter asked for at the last session?

Mr. MCNAMARA: We have.

Mr. GLASSIE: We offer in evidence, and ask the court to take judicial notice of the form 3214, application for entry of second class matter, produced by the defendant, which is agreed to be the form of application for admission of publications at the second class rates of postage in force and in use in the Post Office Department at the time of the admission of Tip Top Weekly involved in this suit, and also the following:

1. Circular No. 23.

2. Postal Laws and Regulations, Edition of 1902, more especially Sections 427, 432, 438, 439, 448, 450, 451, 453, 454, 468, 469 and 470.

3. Circular No. 3.

4. Circular No. 4.

5. Circular No. 25, issued subsequently to the regulations above mentioned, Edition of 1902.

371 Whereupon HARWOOD M. BACON, a witness recalled on behalf of the defendant, was examined and testified as follows:

Direct examination.

By Mr. McNAMARA:

Q. Mr. Bacon, are you familiar with what is known as Circulars Nos. 3, 4, 23 and 25? A. I am.

Q. Have those Circulars been rescinded? A. Those Circulars have not been formally rescinded over the signature of the Third Assistant Postmaster General, but since the incumbency of the present Third Assistant the Department has not been adhering to the information therein contained in deciding cases coming before it.

Q. Do you know what is the date of the incumbency of the present Third Assistant? A. On or about March 4, 1907—in March, 1907.

Q. I will ask you from your knowledge of the practice of the Post Office Department whether the Department since the date you gave, has been acting under the provisions of these Circulars with reference to the exclusion of matter from second class mail? A. No sir, not necessarily.

Q. Well, in any way? A. There are certain provisions in those Circulars under which the Department operates, for instance, it regards copies of a publication paid for at the full advertised price by a person as subscribers' copies; and in many other re-
372 spects the Circulars might be regarded as still in force. But to say that the Department is adhering strictly to the Circulars would not be correct.

Q. Did the Department act under these Circulars in its decision to exclude the publications involved in this suit in the second class of mail? A. It did not.

Q. I invite your attention to paragraph 2 of Section 133 of the Postal Laws and Regulations. Is that Section at the present time, or has it been for two or three years past in force, and has it been acted under? A. The Third Assistant Postmaster General has not made use of that regulation in determining the question of the admissibility or non-admissibility of publications.

Q. Since what time, if you know? A. Since practically the time of the decisions in the cases of the Railway Publication Company vs. Payne, 20th Appeals.

Cross-examination.

By Mr. GLASSIE:

Q. In using the term "made use of" in respect of Section 132, you mean, do you not, that the Postmaster General has not in express terms cited that Section as a ground for his action? A. I do. And I also mean that he has not in practice made use of that regulation inasmuch as certain publications, such as railway guides *are* under it, had been held to be inadmissible as second class matter, are now passing in the mails at those rates.

373 Q. That section, 132, stands unrescinded in the Postal Laws and Regulations, does it not? A. Yes.

Q. So when you say it has not been made use of you are simply giving your construction of the action which has been taken by the Postmaster-General? A. Precisely.

Q. Now, you speak of what the Department is now doing, and I suppose you refer to the present time? A. Yes.

Q. When were the present regulations respecting second class mail matter promulgated? A. In December 1907.

Q. A pamphlet embodying those regulations made on that date has been issued by the Department, has it not? A. It has.

Q. You will observe Mr. Bacon that the citation against the publications in this case issued on May 17, 1907. Will you state what official action prior to that date had been taken for the rescission of circulars 3, 4 and 25, and if so cite us to the official act making such decision? A. There is no official act of rescinding.

Q. And no new regulations covering the same field were issued until December 1909? A. No sir.

HARWOOD M. BACON.

By THE EXAMINER,

As Stipulated by Counsel.

The solicitor for complainants announced his case closed.

The solicitor for defendant also announced his case closed.

374 *Order substituting Frank H. Hitchcock as Defendant.*

Filed May 4, 1909.

In the Supreme Court of the District of Columbia.

At Law. No 27279.

ORMOND J. SMITH et al., Complainants,

vs.

GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the retirement from office of Postmaster General of George von L. Meyer and the motion that his successor Frank H. Hitchcock be substituted as defendant, it is this fourth day of May, 1909, by the court ordered:

That Frank H. Hitchcock, Postmaster General of the United States, be and he is hereby substituted as defendant is this cause, and that the same be maintained against him as the successor in office of the said George von L. Meyer.

WRIGHT, *Justice.*

375 *Final Decree.*

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading Under the Firm Name of Street & Smith.

vs.

FRANK H. HITCHCOCK, Postmaster General of the United States.

This cause came on to be heard upon the pleadings and evidence and was argued by counsel for the respective parties and considered by the Court; whereupon the Court finds that the order of July 26, 1907, recited in the bill was issued without a hearing, such as is provided for by law; whereupon it is this 11th day of June, 1909, by the Court ordered, adjudged and decreed that the defendant, Frank H. Hitchcock, Postmaster General, his agents and subordinates, be and they hereby are enjoined from enforcing the order of July 26th, 1907, revoking the authority granted for acceptance of the Tip Top Weekly for mailing at the second class rates of postage; and from refusing to receive the issues of said publication and to transmit the same through the mails of the United States as mailable matter of the second class. None of the other issues made by the pleadings are determined.

WRIGHT, *Justice.*

376 From the above decree the defendant in open court herewith prays an appeal to the Court of Appeals which is hereby allowed.

THOS. H. ANDERSON, *Justice.*

Suggestion of Interest of the United States.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH et al., Complainants,

vs.

FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

Now comes the Attorney of the United States in and for the District of Columbia, and suggests to the Court that it appears by the pleadings and record herein that the suit is brought against the defendant, the Postmaster General of the United States, in his official capacity as an officer of the United States, and that the said suit is one solely against the said United States, its interests and its proper-

ties, and that the said defendant is not sued in his personal capacity, and that he had no personal interest or concern therein.

377 And the said Attorney of the United States in and for the District of Columbia hereby makes due suggestion to the Court that the appeal prayed and taken herein from the decree of the Court entered herein on the eleventh day of June, A. D. 1909, was taken by direction of the Attorney General of the United States and by the Postmaster General of the United States, and that the said case, and the said appeal, are to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

Suggestion of Interest of United States as to Taking Appeal.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27279.

ORMOND G. SMITH et al., Complainants,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The Clerk of Court will please take notice that the appeal prayed and taken herein on the eleventh day of June, A. D. 1909, from the decree of the Supreme Court of the District of Columbia issuing an injunction, entered the eleventh day of June, A. D. 1909, by the defendant, is taken by direction of the Attorney General of

378 the United States and by the Postmaster General of the United States, and is to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 23, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 27279.

ORMOND G. SMITH et al., Complainants,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The following pleadings and papers are hereby designated by counsel for defendant as the record to be made and filed in the Court of Appeals for the District of Columbia, in the appeal prayed and taken herein from the judgment of the Supreme Court of the District of

Columbia, on the tenth day of June, A. D. 1909, granting the injunction prayed for in the bill:

1. The bill of complaint, with exhibits.
2. The rule to show cause.
3. The restraining order.
379 4. The answer of defendant, with exhibits.
5. Replication.
6. Testimony.
7. Order substituting Frank H. Hitchcock, vice Meyer, Postmaster General, resigned.
8. Decree.
9. The suggestion of the interest of the United States in the suit.
10. The notice to the clerk that the appeal was taken by the direction of the heads of Departments of the United States, and is, and is to be treated as, an United States case.
11. And this order.

DANIEL W. BAKER,
Solicitor for Defendant.

Further Directions for Making Up Record on Appeal.

Filed July 2, 1909.

In the Supreme Court of the District of Columbia

In Equity. No. 27279.

ORMOND G. SMITH et al., Complainants,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

In addition to the pleadings and papers designated by counsel for the defendant, the clerk will please include in the record to
380 be made up and filed in the Court of Appeals, the following:
1. Depositions taken in the cause before Herbert W. Knight at Newark, New Jersey.
2. All exhibits, offered in evidence and filed in the cause.
3. And this order.

J. J. DARLINGTON,
H. H. GLASSIE,
Solicitors for the Complainants.

Memorandum.

July 14, 1909. Time to which to file Transcript of Record in Court of Appeals extended to, and including, the tenth day of September, A. D. 1909.

381 *Stipulation.*

Filed August 12, 1909.

In the Supreme Court of the District of Columbia.

No. 27279. Equity.

ORMOND G. SMITH et al., Complainants,

vs.

FRANK H. HITCHCOCK, Postmaster General, Defendant.

It is, this 6th day of August, A. D. 1909, hereby stipulated by and between the parties to the above cause, by their respective solicitors, subject to the approval of the Court of Appeals, that, from the transcript of the record for appeal to the said Court of Appeals, all the exhibits may be omitted, with the right to any party to produce and use the originals thereof at the hearing in said Court of Appeals, with like effect as if the same were included in the transcript of the record filed in that Court and in the printed copies thereof required by the rules, the printing thereof being dispensed with, and that the same procedure shall obtain in the case of any appeal in this cause to the Supreme Court of the United States, subject to the approval of that Court.

H. H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainants.
DANIEL W. BAKER,
Solicitor for Defendant.

382 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 381, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 27279, wherein Ormond G. Smith et al. are Complainants, and Frank H. Hitchcock, Postmaster-General of the United States is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of September, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2059. Frank H. Hitchcock, &c., appellant, vs. Ormond G. Smith et al. Court of Appeals, District of Columbia. Filed Sept. 10, 1909. Henry W. Hodges, Clerk.

TUESDAY, *February 8th, A. D.* 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

and

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
FRANK TOUSEY, Publisher, a Corporation.

The argument in the above entitled causes was commenced by Mr. James J. Britt, attorney for the appellant.

WEDNESDAY, *February 9th, A. D.*, 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

and

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
FRANK TOUSEY, Publisher, a Corporation.

The argument in the above entitled causes was continued by Mr. James J. Britt, attorney for the appellant, and by Messrs. J. J. Darlington and H. H. Glassie, attorneys for the appellees, and was concluded by Mr. D. W. Baker, attorney for the appellant.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

This is an appeal from a decree of the Supreme Court of the District of Columbia enjoining the Postmaster-General from revoking an order entitling the "Tip Top Weekly," a publication of appellee, to second-class rates of postage and from refusing to receive the issues of said publication and to transmit the same through the mails of the United States as matter of said class.

The order admitting this publication to said second class was dated March 1, 1897. On May 17, 1907, the Third Assistant Postmaster-General, hereinafter called the Third Assistant, under whose supervision the classification of mail matter is made, sent the following notice to appellees:

"You are hereby notified that, in accordance with the act of Congress approved March 3, 1901 (Ch. 851, 31 Stats. at L., 1107), you will be granted a hearing at the office of the Third Assistant Postmaster-General, Washington, D. C., at 2 p. m., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip Top Weekly to the second class of mail matter under the act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, upon the following ground:

"That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (Ch. 180, 1 Supp. R. S., page 246), governing "mailable matter of the second class," but are in fact books, which, under section 17 of said act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

"Your answer, in writing, must be submitted on or before June 11, 1907.

"Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative."

Thereafter, on June 10, 1907, a representative and employee of appellee, WM. H. HEINES, by name, appeared at the office of the Third Assistant and submitted a printed answer to the above citation, saying that he would call on the day following, which was the return day named therein. His reason for leaving this answer on the day before the return day was "to give him (the Third Assistant)

POOR COPY

an opportunity to read the paper to see if he had anything to ask the next day." On the next or return day Mr. Heines again appeared at the office of the Third Assistant, and that official being engaged, was referred to the Superintendent of the Classification Division, a Mr. Bacon. Mr. Heines was told by the secretary of the Third Assistant why that official could not then see him. Mr. Bacon informed Mr. Heines that he had looked over his brief or answer and that the case had been very fully covered therein. Mr. Bacon then asked Mr. Heines "whether or not he had anything further to say, to which he made reply that he had not, except that he desired to have the Department consider in connection with the cases, a little pamphlet which he handed me, which showed the high regard in which the clergy (I believe it was the clergy) held the publication. And that circumstance I made a memorandum of and filed it in the case." The pamphlet referred to was entitled "A General Description of the Character and Influence of the Present Day Dime Novels."

Mr. Heines was asked whether he disclosed his business to Mr. Bacon, and replied: "*I told him I was down there to answer any questions they might ask me.*" After his interview with Mr. Bacon the witness returned to the office of the Third Assistant and found him still engaged. He left his card with the clerk with the statement that he would await any telephone message that might be sent to him at his hotel in this city. Witness was asked in cross-examination whether, upon that occasion, he sent word to the Third Assistant that he desired to see him personally, and answered "I told the clerk that, yes. I said that I would like to meet the gentleman." The witness was further asked whether he informed the Third Assistant that he wanted to make an argument, and replied "No. Told him I was there in reply to the citation." The witness admitted that he made no attempt in his interview with Mr. Bacon, to say anything which he did not have in his printed brief; that he had no other papers to file; that Mr. Bacon may have said to him "that the brief covered the case very well." We here reproduce the following questions and answers from the cross-examination of this witness: "Q. Was there anything in your mind that you desired to say other than what you had incorporated in your answer? A. No, sir. * * * Q. Your complaint is that they did not ask you any questions, is it not? A. Yes, sir. Q. In other words, you felt that because you were not asked questions you did not get a hearing? A. Yes, sir. Q. That is your view of it? A. Yes, sir. * * * Q. You wrote the brief, did you not? A. Yes, sir. Q. And you knew all the reasons which appeared in the citation? A. Yes, sir; but I thought they might have something further to say—some more reasons. Q. Is that what you complain about now? A. We wanted to hear what more they had to say about it. Q. I understand that you nevertheless have said to them what you wish to say in response to the charges in the citation? A. Yes, sir.

On July the 26th the Third Assistant sent the following communication to the postmaster at New York, who notified the appellees as required in that letter:

"SIR: In connection with the rule to show cause, you are inf
that a hearing was given the publishers of the 'New Nick
Weekly,' 'Buffalo Bill Stories,' the 'Tip Top Weekly,' and 'Dia
Dick, Jr.,' at this office on June 11, 1907.

"The arguments of the counsel for the publishers were consi
and submitted to the Assistant Attorney-General for the Post-
Department, who held that the publications in question wer
'periodical publications' within the meaning of the law, but 'b
and therefore not entitled to transmission at the second-class ra
postage.

"In this opinion I concur and accordingly decide that the iss
the 'New Nick Carter Weekly,' 'Buffalo Bill Stories,' the 'Tip
Weekly,' and 'Diamond Dick, Jr.,' do not constitute newspap
other periodical publications as required by sections 7, 10, 12
14, of the act of Congress of March 3, 1879 (Ch. 180, 1 Supp.,
246), governing 'mailable matter of the second class,' but are i
books, which, under section 17 of said act, are third-class matte
chargeable when sent in the mails at the rate fixed by law fo
class of mail matter.

"Therefore, the authority granted for acceptance of the 'New
Carter Weekly,' 'Buffalo Bill Stories,' the 'Tip Top Weekly'
'Diamond Dick, Jr.,' for mailing at the second-class rates of p
is hereby revoked and you are directed to enter that fact upo
records of your post-office.

"You will require postage at the third-class rate—one cen
each two ounces or fraction thereof—to be prepaid by stamps a
upon each separately addressed copy or package or unaddressed c
of the publication hereafter mailed at your office.

"A copy of the opinion of the Assistant Attorney-General fo
Post-Office Department referred to is herewith enclosed to be ha
to the publishers for their information."

No application for a rehearing was made, but on August 8,
appellees filed their bill in which they aver: "That the que
whether the said publication is a periodical publication within
meaning of the law and therefore entitled to transmission as sec
class matter is a pure question of law to be determined by a
parison of the said publication itself with the conditions set o
the said act of March 3, 1879."

The learned trial judge based his decision upon the ground
the order revoking the privilege of mailing appellees' publicati
the second-class rate of postage "was issued without a hearing su
is provided for by law."

We will first consider the assignments of error directed to this p
of the case. The act of March 3, 1901 (31 Stat., 1099-1107), or
that "when any publication has been accorded second-class
privileges the same shall not be suspended or annulled until a hea
shall have been granted to the parties interested." No questio
here made that the Third Assistant did not have jurisdiction in
premises, the objection being as to the manner of the exercise of
jurisdiction.

It is first contended that the notice to show cause was not sufficiently explicit. This objection, we think, is without merit. The notice stated that on a day named appellees would be called upon to show cause why the second-class mail privilege should not be revoked and third-class rates charged "upon the following *ground:* That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (Ch. 180, 1 Supp., R. S., page 246), governing 'mailable matter of the second class,' but are, in fact, books," etc. No objection was raised as to the sufficiency of this notice, and the answer submitted "covered the case very fully." The reference in the opinion of the Assistant Attorney-General for the Post-Office Department to other publications of appellees is entirely immaterial. The Third Assistant testified that this opinion "was a collective one covering a number of publications" and was simply advi-ory. Moreover, appellees, in their petition, aver that the question whether their publication is a periodical within the meaning of the law and entitled to registration as second-class matter "is a pure question of law to be determined by a comparison of the said publication itself with the conditions set out in the said act of March 3, 1879." That is, in effect, what they were told in the notice to show cause. While the citation might have stated in greater detail the reasons prompting it, still this was not legally necessary. The question, as suggested by appellees, was a legal one and they were charged with notice of the requi-ites of a periodical and wherein their publication, intrinsically considered, failed to respond to those requisites. Was their publication a periodical or was it a book? The Department could not change the law. It could neither add to nor take from the requisites of a periodical. It could simply apply the law which, theoretically, was as well known to appellees as to it. We rule, therefore, that the notice given appellees was sufficient to enable them intelligently to defend the privilege theretofore extended.

The next question is whether appellees were accorded a hearing. In determining this question it must be remembered that no fixed and arbitrary rule has been laid down and that hearings of such a nature are necessarily much more informal than judicial hearings. Palmer v. McMahon, 133 U. S., 660. Due process of law, in a case like the present, is had when full opportunity is presented to introduce all the evidence and arguments which the party interested deems important, and to be confronted with witnesses against him, he having had notice of the question at issue. Pittsburgh, etc., R. R. v. Backus, 154 U. S., 421; Londoner v. Denver, 210 U. S. 373. In Garfield v. Spalding, 32 App. D. C., 153-58, the question under consideration related to disbarment proceedings in the Interior Department, and this court, through Mr. Chief Justice Shepard, said: "Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in supporft of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts."

In this case a written answer was submitted. The representative

of appellee- did not ask to introduce witnesses. There was no c
of the privilege of being confronted with opposing witnesses be
none were produced by the Department. It was not necessar
the Department officials to discuss the case with the represen
of appellees. They had read the comprehensive answer subm
and in the light of its contents had no further questions to ask
advantage can be taken of the failure of the Third Assistan
sonally to see appellees' representative, because the testimony
that that official, before reaching a decision, considered the a
submitted, and it fails to show that appellees' representative d
or offered to make an argument. The testimony of Mr. Heines
irresistibly to the conclusion, suggested in one of his answers
his real object in appearing before the Department was to gai
ther information concerning the attitude of the Department t
the publication mentioned in the citation and not to make an
ment before anyone. It is, we think, clear that had he des
hearing before the Third Assistant full opportunity would have
given him.

We come now to a determination of the question whethe
issues of this publication constitute a periodical within the me
of the act of March 3, 1879 (20 Stat., 355, 358), relating
classification of mail matter. While this question is one
rather than one of fact and, as such, subject to judicial revie
decision of the Post-Office Department is nevertheless entit
great weight and unless clearly erroneous ought not to be dist
United States ex rel. Reinach v. Cortelyou, 28 App. D. C.,
Bates & Guild Co. v. Payne, 194 U. S., 106.

It is admitted that this publication complies with the ou
conditions and characteristics prescribed by law for mailable
of the second class, the sole contention being that "internal
substance and in general contents, it does not have the chara
tics of said class of mail matter, but is in fact a book, and as s
included in the third-class of mail matter as designated by
This publication, as its name indicates, is issued weekly and
circulation of something more than 100,000 copies. Of this n
2,500 are sent to regular subscribers and the balance to the Am
News Company, which acts as distributing agent to the various
dealers throughout the country. The publication is about eig
eleven inches in size and each issue contains about thirty-two
substantially given over to one complete story, the last few
being devoted to an announcement of the names of those wh
made efforts to increase the circulation of the publication,
mendatory letters purporting to come from its readers, and
questions and answers relating to athletics. It is the custom
pellees to reissue these stories in book form, two or three stories
taken for a book. While the stories are reprinted for that p
they are not changed in other respects. It is contended by
lees that these stories, while complete in themselves, deal wi
same hero and, for the most part, are written by the same
and form a more or less connected narrative. The testimony
ever, does not fully bear out this contention. While it is tru

POOR CO

the same hero appears throughout the stories and that they are mostly written by the same author, it is equally true that each story is a complete piece of fiction not connected with or in any manner dependent upon any other story. The following stories, which appeared in the series, will give some idea of the extent to which "the stories run naturally from one to another," as contended by appellees:

"Frank Merriwell in Arizona; or, the Mysteries of the Mine."
"Frank Merriwell's Friend; or, Muriel the Moonshiner."
"Frank Merriwell's Double; or, Fighting for Life."
"Frank Merriwell Meshed; or, the Last of the Danites."
"Frank Merriwell in Gorilla Land."
"Frank Merriwell's Magic; or, the Pearl of Tangier."
"Frank Merriwell in London; or, the Grip of Doom."
"Frank Merriwell's Venture; or, Driven from Armenia."
"Frank Merriwell in India."
"Frank Merriwell's Vow; or, After Big Game in Ceylon."
"Frank Merriwell in Japan; or, the Sign of the Avenger."
"Frank Merriwell's Game; or, Snaring the Sharper."
"Frank Merriwell's Drift; or, With the River Drivers."
"Frank Merriwell on the Road."
"Frank Merriwell's First Part; or, the Start as an Actor."
"Frank in Advance; or, the Adventures Ahead of the Show."
"Frank Merriwell's Own Company; or, Barnstorming in the Middle West."
"Frank Merriwell's New Venture; or, the Finding of Elsie."
"Frank Merriwell's Advancement; or, the Engineer of the Mountain Express."
"Frank Merriwell Held Up; or, the Robbery of the Mountain Express."
"Frank Merriwell as a Ferret; or, the Tracking of the Train Wreckers."
"Frank Merriwell's Peril; or, the Smugglers of the Border."

The real question in this case is whether the external or the internal characteristics of a given publication shall control in determining the classification of that publication for transmission through the mails, whether a novel is entitled to go through the mails as matter of the second class because it has preceded and will be followed by other novels by the same author and relating to the same hero or characters. It is, in effect, contended on behalf of appellees that such was the intent of Congress in defining mailable matter of the second class, but the decision of the Supreme Court of the United States in Houghton v. Payne, 194 U. S., 88, in which said act of March 3, 1879, was carefully reviewed, we think negatives that contention. The court was there dealing with the publications of the "Riverside Literature Series," which consisted of small books, each book containing a single novel or story, or a collection of poems or stories by the same author, and most, if not all, being reprints of standard works. Each number, however, was complete in itself and entirely disconnected with every other number. The court in its opinion undertook to define in a general way a periodical, which,

the court said "as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature." In defining a book the court said: "A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors." The opinion concluded as follows: "We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving a classification of them as periodicals, notwithstanding the length of time such classification obtained."

If the issues of appellees' publication were reduced in size so as to correspond in that respect with ordinary novels, would any one contend that they were not books within the meaning of the law? Manifestly, if a series of stories of the length of each of these stories is a periodical simply because periodically issued and so denominated, a series of stories or novels containing three times as much matter may also pass as periodicals.

Said act of March 3, 1879, fixed an almost nominal rate of postage on "periodical publications," embracing (section 10) "all newspapers and other periodical publications." While the act prescribes certain requisites of a periodical publication, it stops there, and thus permits the ordinary meaning of the term to govern. Houghton v. Payne, supra. Mail matter is divided into four classes. The designation of the first, written matter, and of the fourth, merchandise, being free from ambiguity. The second and third overlap, and give rise to some uncertainty. The third class includes miscellaneous printed matter, and embraces "books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section 12), proof sheets, corrected proof sheets, and manuscript copy accompanying the same." It is clearly apparent, we think, that Congress, in extending nominal rates of postage to periodical publications, was actuated by a desire to serve the public rather than the publishers. In other words, we think it is apparent that Congress was endeavoring to provide a speedy and inexpensive vehicle of communication among the people, and that when periodical publications were referred to it did not have in mind dime novels. Books and publications like the one here involved may well await a less expensive if less speedy means of conveyance. There is no need for haste, and no apparent reason why the mails should be burdened with them.

There is absolutely nothing current in the issues of the publica-

tion under consideration. The January numbers would be just as satisfactory to appellees' patrons if sent in December, and, as above indicated, the one difference between these stories and ordinary novels is the size of the publication. We are not able to distinguish the issues of this publication from the ordinary and everyday understanding of the term book, and think it apparent that they are not entitled to be transmitted in the mails at second-class rates. We are certainly not prepared to hold that the exercise of the judgment and discretion of the postal authorities should be disturbed.

The decree must be reversed, with costs, and the cause remanded for further proceedings.

Reversed.

TUESDAY, *March 1st, A. D.* 1910.

January Term, 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings.

Per Mr. JUSTICE ROBB,
March 1, 1910.

FRIDAY, *March 11th, A. D.* 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

The motion to modify the decree in the above entitled cause was submitted to the consideration of the Court by Mr. H. H. Glassie, of counsel for the appellees, in support of motion.

FRIDAY, *March 11th, A. D.* 1910.

January Term, 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

Upon motion of the attorneys for the appellees herein, a decree and order passed in the above entitled cause on the first day of March A. D. 1910, is hereby amended and modified as follows: That portion of the decree and order directing the cause to be remanded to the lower Court for further proceedings is hereby stricken out, and in place thereof the said decree shall read, "that the bill of complaint in said cause be, and it is hereby, dismissed, and the injunction issued on June 11th, 1909, be, and the same is hereby, dissolved, provided, however, that upon the appellees herein furnishing bond in the sum of $20,000 to be approved by the Court, the said injunction is to continue in force pending the appeal to the Supreme Court of the United States."

This decree was submitted by agreement of counsel and is entered as prepared by them.

SETH SHEPARD,
Chief Justice of the Court of Appeals.

FRIDAY, *March 11th, A. D.* 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith.

On motion of Mr. H. H. Glassie, of counsel for the appellees, in the above entitled cause, It is ordered by the Court that said appellees be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars, the injunction bond by the amended decree filed herein being fixed at the sum of twenty thousand dollars.

In the Court of Appeals of the District of Columbia, January Term, 1910.

No. 2059.

FRANK H. HITCHCOCK, Postmaster General,
vs.
ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street and Smith.

Know all men by these presents, That we, the undersigned, Ormond G. Smith, George C. Smith and Cora A. Gould, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to the United States of America. To which payment well and truly to be made we bind ourselves, and each of us, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Ormond G. Smith, George C. Smith and Cora A. Gould, trading under the firm name of Street and Smith, have applied for an appeal to the Supreme Court of the United States from a decree of the Court of Appeals of the District of Columbia, and are desirous of continuing in effect, pending said appeal, a certain injunction granted in the above entitled cause by the Supreme Court of the District of Columbia on June 11th, 1909, whereby the Postmaster-General of the United States was restrained and enjoined from revoking the authority granted for the acceptance of the Tip Top Weekly, a publication issued by the said firm of Street and Smith, for mailing at the second class rates of postage,

And whereas, security is desired by the United States of America that the said Ormond G. Smith, the said George C. Smith and the said Cora A. Gould, trading under the firm name of Street and Smith, shall well and truly pay or cause to be paid to the United States of America the aggregate difference between the postage chargeable at the third class rate of postage and that charged at the second class rate of postage, on the copies of the publication known as Tip Top Weekly, which, at or upon the final termination of the suit between the aforesaid parties in the Supreme Court of the United States, or in any other court, shall have been deposited in and transmitted through the mails since the first day of March, A. D. 1910.

Now, therefore, the condition of this obligation is such, That, if the above named Ormond G. Smith, George C. Smith and Cora A. Gould, trading under the firm name of Street and Smith, shall prosecute the said appeal to effect in the Supreme Court of the United States, and, if they shall fail to make good their appeal, answer all damages which the United States of America may sustain from the

first day of March, A. D. 1910, in consequence of the said injunction being continued in force pending this appeal, and further make due payment for all damages to the United States of America accruing from the aggregate difference between the postage chargeable at the third class rate of postage and that charged at the second class rate of postage on the said publication, Tip Top Weekly, which, at or upon the final termination of the suit between the aforesaid parties, in the Supreme Court of the United States, or any other court, shall have been deposited in and transmitted through the mails since the first day of March, A. D. 1910, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed with our seals, and dated this 15th day of March, A. D. 1910.

ORMOND G. SMITH. [SEAL.]
GEORGE C. SMITH. [SEAL.]
CORA A. GOULD. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By HORACE P. HOLLISTER,
Resident Vice President.

[Seal of American Surety Company of New York.]

Attest:
MARSHALL L. BROWER,
Resident Ass't Secretary.

Witness-:
WM. H. HEINES.
WM. H. HEINES.
GEORGE H. GOULD.

Approved by—
SETH SHEPARD,
Chief Justice, Court of Appeals of the District of Columbia.

March 22, 1910.—Satisfactory.
F. SPRIGG PERRY,
Ass't U. S. Att'y.

(Endorsed:) In the Court of Appeals of the District of Columbia. Frank H. Hitchcock, Postmaster General of the United States, vs. Ormond G. Smith, George C. Smith and Cora A. Gould, trading under the firm name of Street & Smith. No. 2059. Injunction Bond. Court of Appeals, District of Columbia. Filed Mar. 22, 1910. Henry W. Hodges, Clerk.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Ormond G. Smith, George C. Smith and Cora A. Gould, as principal-, and American Surety Company of New York, as surety, are held and firmly bound

POOR COPY

unto Frank H. Hitchcock, Postmaster General of the United States, in the full and just sum of three hundred ($300) dollars, to be paid to the said Frank H. Hitchcock, Postmaster General of the United States, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of March, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Frank H. Hitchcock, Postmaster General of the United States, appellant, and Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street and Smith, appellees, a decree was rendered against the said Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street and Smith, appellees, and the said Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street and Smith, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Frank H. Hitchcock, Postmaster General of the United States, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street and Smith, shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ORMOND G. SMITH. [SEAL.]
GEORGE C. SMITH. [SEAL.]
CORA A. GOULD. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By RICHARD DEMING, [SEAL.]
Resident Vice President.

[Seal of American Surety Co.]

Attest:
JARED F. HARRISON,
Resident Assistant Secretary.

Sealed and delivered in presence of—
[NOTARIAL SEAL.]
CHARLES W. OSTERTAG,
Notary Public No. 37, County of New York.

Approved by—
SETH SHEPARD,
Chief Justice, Court of Appeals of the District of Columbia.

March 22, 1910.—Satisfactory.
F. SPRIGG PERRY,
Ass't U. S. Att'y.

[Endorsed:] No. 2059. Court of Appeals, District of Columb
Frank H. Hitchcock, Postmaster General of the United Stat
against Ormond G. Smith, and others. Bond for Costs on appeal
Supreme Court U. S. Court of Appeals, District of Columbia. Fil
Mar. 22, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Frank H. Hitchcock, Postmaster General of the United Stat
Greeting:

You are hereby cited and admonished to be and appear at a S
preme Court of the United States, at Washington, within 30 da
from the date hereof, pursuant to an order allowing an appeal, fil
in the Clerk's Office of the Court of Appeals of the District of C
lumbia, wherein Ormond G. Smith, George C. Smith and Cora
Gould, trading under the firm name of Street & Smith, are app
lants and you are appellee, to show cause, if any there be, why t
decree rendered against the appellants, should not be corrected, a
why speedy justice should not be done to the parties in that beha

Witness, the Honorable Seth Shepard, Chief Justice of the Co
of Appeals of the District of Columbia, this 22d day of March,
the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of
the District of Columbia.

Service accepted March 22, 1910.

DANIEL W. BAKER,
Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed M
22, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the Distr
of Columbia, do hereby certify that the foregoing printed and ty
written pages numbered from 1 to 197, inclusive, contain a true co
of the transcript of record and proceedings of said Court of Appe
in the case of Frank H. Hitchcock, Postmaster General of the Uni
States, Appellant, vs. Ormond G. Smith, George C. Smith, and C
A. Gould, trading under the Firm name of Street & Smith. N
2059, January Term, 1910, as the same remain upon the files a
records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and a
the seal of said Court of Appeals, at the City of Washington, t
24th day of March, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia

POOR COPY

In the Supreme Court of the United States, October Term, 1911.

No. 250.

ORMOND G. SMITH et al., Trading as Street & Smith, Appellants,
vs.
FRANK H. HITCHCOCK, Postmaster General.

The appellants, by their counsel and solicitors, say that the decree and order passed in the above entitled cause, by the Court of Appeals of the District of Columbia, on the first day of March, 1910, is erroneous in the following particulars, which said appellants respectfully assign as errors:

1. Said Court of Appeals erred in reversing the decree entered by the Supreme Court of the District of Columbia on June 11, 1909 (Rec. p. 181), and in dismissing appellants' Bill of Complaint, and in dissolving the injunction granted by its said final decree of June 11, 1909.

2. Said Court of Appeals erred in holding that, before annulling, by the order of July 26, 1907, the certificate of entry of appellants' publication as second class mail matter previously granted on March 1, 1897, the Postmaster General accorded appellants a hearing in compliance with the requirement of the Act of March 3, 1901, Ch. 851 (31 Stats. L. 1107).

3. Said Court erred in holding that the citation dated May 17, 1907, constituted due notice of the specific charges upon which the Post Office Department intended to proceed at the hearing fixed in said citation, for June 11, 1907.

4. Said Court erred in reversing the holding of the Court below that the order revoking appellants' certificate of entry was issued without a hearing, such as is provided for by law.

5. Said Court erred in holding that the proceedings had at the Office of the Superintendent of Classification in the Post Office Department on June 11, 1907, constituted a hearing, as required by the Act of March 3, 1901, Ch. 851.

6. That said Court erred in holding that the Postmaster General, in annulling appellants' certificate of entry and in excluding their publication from the second class of mail matter without any other hearing than the proceedings of June 11, 1897, did not deprive appellants of a right of property without due process of law.

7. That said Court erred in holding that the successive numbers of the Tip Top Weekly do not constitute a periodical publication within the meaning of the Act of March 3, 1879, Ch. 180 (20 Stats. L. 358).

8. That said Court erred in holding that the successive numbers of the Tip Top Weekly do not constitute a periodical publication within the ordinary meaning of the term.

9. That said Court erred in refusing to hold that the settled and uniform construction of the terms, "periodical" and "periodical publications," as used in the prior postal acts of June 28, 1872, Ch.

335, and in Sections 3884-3886, 3905, 3906, 3908, was not adopted and written into the Act of March 3, 1879, Ch. 180, by the continued use of said terms.

10. Said Court erred in refusing to hold that the rejection of the proposed amendment altering the provisions embraced within the Act of March 3, 1879, in the sense in which said provisions are now sought to be construed by administrative action, is not conclusive as to the meaning intended to be placed by Congress upon said provisions.

11. That said Court erred in holding that, in order to be entitled to be second class entry as a periodical publication under the Act of March 3, 1879, Ch. 180, every number of a publication must, as a matter of law, consist of a variety of original articles by different authors and be incomplete in itself.

12. That said Court erred in refusing to hold that the regular, habitual, and uncontested admission of publications, substantially similar to appellants' publication which was excluded, constitutes a denial of the equal protection of the laws, and an arbitrary, unjust and capricious discrimination against appellants' publication without warrant of law and beyond the scope of the authority of the Postmaster General.

13. That said Court erred in holding that each of the numbers of appellants' publication is a complete piece of fiction not connected with, or dependent upon, any other number, and that the numbers of said publication have no literary continuity.

14. That said Court erred in holding that, internally and in substance, each number of appellants' publication is a book.

J. J. DARLINGTON,
H. H. GLASSIE,
Solicitors for Appellants.

[Endorsed:] October Term, 1911, No. 250. 22,097. Ormond G. Smith et al., trading as Street & Smith, Appellants, vs. Frank H. Hitchcock, Postmaster General. Assignment of Errors. J. J. Darlington, Henry H. Glassie, Attorneys for Appellants.

[Endorsed:] File No. 22,097. Supreme Court U. S., October Term, 1911. Term No. 250. Ormond G. Smith et al., etc., Appellants, vs. Frank H. Hitchcock, Postmaster General. Assignment of Errors. Filed January 2, 1912.

Endorsed on cover: File No. 22,097. District of Columbia Court of Appeals. Term No. 250. Ormond G. Smith, George C. Smith, and Cora A. Gould, trading under the firm name of Street & Smith, appellants, vs. Frank H. Hitchcock, Postmaster General of the United States. Filed April 11th, 1910. File No. 22,097.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 32.

FRANK TOUSEY, PUBLISHER, A CORPORATION, APPELLANT,

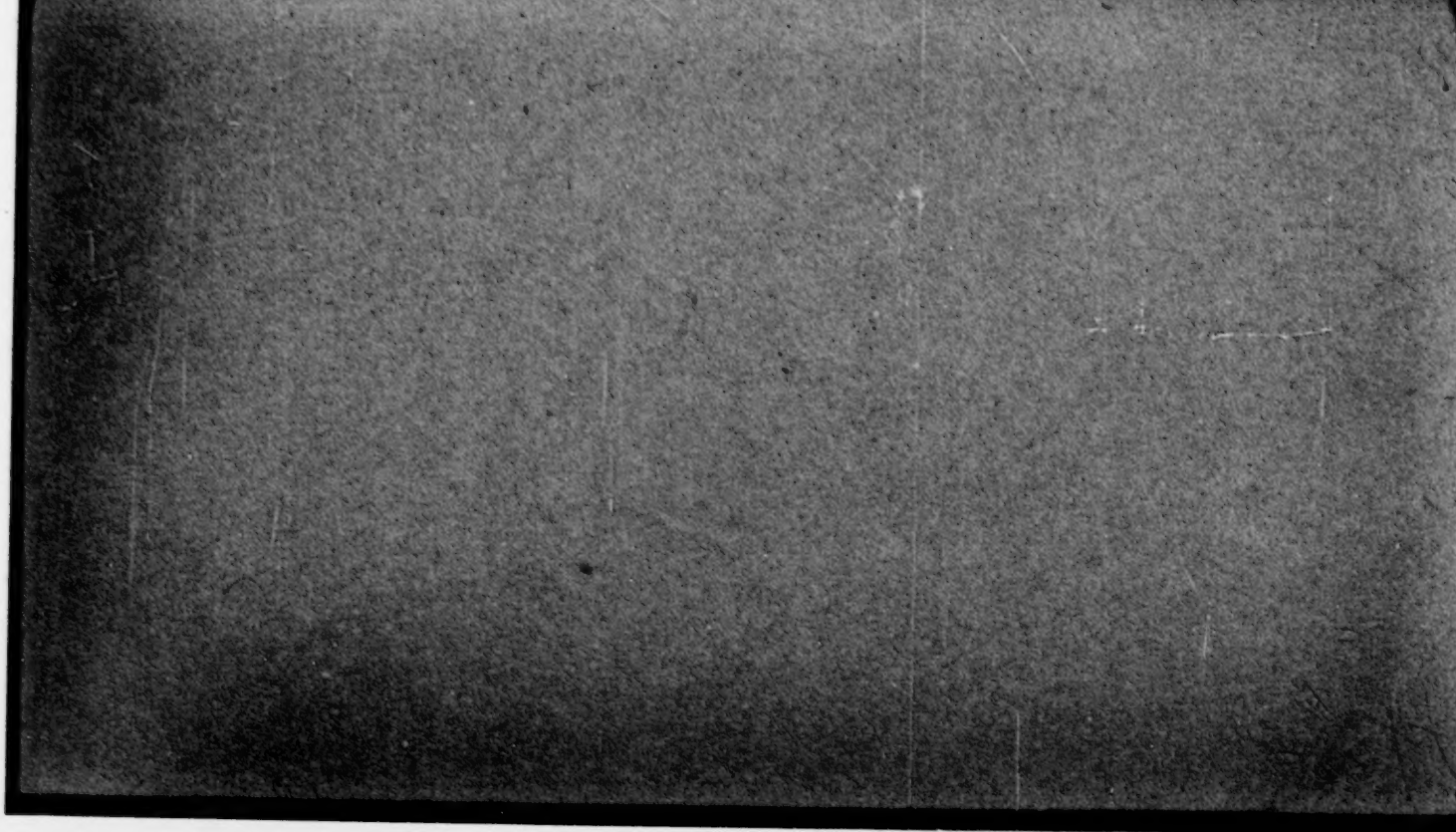
vs.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 11, 1910.

(22,098)



(22,098)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 251.

FRANK TOUSEY, PUBLISHER, A CORPORATION, APPELLANT,

vs.

FRANK H. HITCHCOCK, POSTMASTER-GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Bill	1
Exhibit No. 1—Certificate of entry of publication as second-class matter	10
No. 7—Letter from A. L. Lawshe, Third Assistant Postmaster-General, to postmaster, New York, N. Y., enclosing copy of opinion of the Assistant Attorney-General for Post-Office Department	10
Rule to show cause	11
Marshal's return	12
Restraining order	12
Answer	12
Joinder of issue	24
Order substituting Frank H. Hitchcock as defendant	25
Final decree	25
Appeal noted and allowed	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 6, 1912.

Suggestion of interest of United States.....
Suggestion of interest of United States as to taking appeal.....
Directions to clerk for preparation of transcript of record.....
Further directions for making up record.....
Memorandum: Time to file transcript of record.....
Stipulation as to exhibits.....
Clerk's certificate.....
Minute entries of argument.....
Opinion.....
Decree.....
Minute entry of submission of motion to modify decree.....
Modified decree.....
Order allowing appeal.....
Bond for injunction pending appeal.....
Bond on appeal.....
Citation and service.....
Clerk's certificate.....
Assignment of errors.....

Page
... 26
... 26
... 27
... 28
... 28
... 28
... 29
... 30
... 31
... 31
... 32
... 32
... 32
... 33
... 34
... 36
... 36
... 36

In the Court of Appeals of the District of Columbia.

No. 2060.

FRANK H. HITCHCOCK, &c., Appellant,
vs.
FRANK TOUSEY, &c.

a Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
vs.
FRANK H. HITCHCOCK, Postmaster-General of the United States.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster-General of the United States.

To the Honorable the Supreme Court of the District of Columbia, sitting in Equity:

Your complainant, Frank Tousey, Publisher, a corporation, respectfully shows as follows:

1. Your complainant is a citizen of the United States and a corporation organized under the laws of the State of New York having its principal place of business in the city of New York, and brings this bill in its own right.

II. The defendant is a citizen of the United States and a resident of the District of Columbia, and said defendant is the duly appointed and qualified Postmaster-General of the United States and is herein sued as such Postmaster-General.

III. Your complainant is now, and during the times hereinafter mentioned was, a corporation engaged in the publishing business under the firm name of "Frank Tousey, Publisher" and had,
2 and still has, a place of business in the city of New York in the State of New York. The publishing business of your complainant was established more than thirty-five years ago, during the whole of which time your complainant and its predecessor in title, have been lawfully engaged in the business of publishing periodical publications similar to those hereinafter specifically mentioned.

IV. The complainant is now and was at the time of the acts of the defendant hereinafter complained of the sole owner, proprietor and publisher of a periodical publication hereinafter set out and, until the acts of the defendant hereinafter complained of such publication was, from the date of its establishment, received and transmitted through the United States mails at the rates prescribed by law for periodical publications of the second class. The said publication and the date of its establishment are respectively as follows:

Work and Win, Established in December, 1898.

V. Said periodical publication is regularly issued at stated intervals as frequently as four times a year, to wit, at the stated interval of once a week, bears the date of issue and is numbered consecutively, and has been so regularly and consecutively issued since its establishment to the present time.

Said publication has been and is now regularly issued from the known office of publication, to wit, the office of publication of Frank Tousey, Publisher.

Said periodical publication is formed of printed paper sheets without board, cloth, leather or other substantial binding
3 such as distinguish printed books for preservation from periodical publications. Said periodical publication is originated and published for the dissemination of information of a public character and is devoted to literature.

Said publication is not designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

Said periodical publication has a legitimate list of subscribers.

Your complainant further says that said periodical publication has complied, and now complies, with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class and that said periodical publication is matter of the second class; and your complainants files herewith copies of said publication, which in respect to the requirements of mailable matter of the second class are substantially similar to each and every other copy of said publication, the same being exhibits 3, 4, 5 and 6 to be read as a part hereof.

VI. The publication hereinbefore mentioned was, upon proper application, duly admitted by the Post Office Department of the United States to the second class of mail matter for transmission in the mails of the United States at the second class rates of postage provided by law for such matter; and in pursuance thereof the postmaster of the United States at New York did execute, issue and deliver to the complainant, a formal certificate of entry of mail to the second class matter as evidence of such determination, finding and decision that said publication was entitled to such trans-
4 mission. The character of the publication has not since been changed.

Copies of said certificate of entry are hereto annexed, marked Exhibit 1, and are prayed to be read and considered as a part of this bill. The date of said certificate is as follows: Work and Win, December 8, 1898.

VII. From the date of said certificate of entry until the wrongful acts of the defendant hereinafter complained of the publication aforesaid was regularly, that is to say, every week, received and transmitted by the Post Office Department through the mails of the United States as mailable matter of the second class.

VIII. Long prior to the establishment of your complainants' publication aforesaid and prior to the passage of the act of March 3, 1879, publications similar in all respects to the publication aforesaid were regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class, and that such publications were, by all publishers, newsdealers and agents, as well as by the public in general, deemed, held and regarded to be periodical publications and were ordinarily and usually spoken of and treated as such, and that it was in the light of this universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other periodical publications that the act of Congress of March 3, 1879, was enacted and the definitions and conditions mentioned in said act were expressly intended and designed to include and embrace publications of the character of those hereinbefore mentioned.

5 IX. In recognition of the universal understanding of the term periodical publications, as well as of the true intent and meaning of the said act of March 3, 1879, the Post Office Department did, from and after the passage of said act, admit, recognize, treat and transmit publications in all respects identical with the publication of your complainant through the mails as mailable matter of the second class and so continued to do until the 27th day of July, 1907, when the publication of the complainant was unlawfully and wrongfully excluded from the said second class.

X. The complainant further says that at the present time and subsequent to the exclusion of your complainant's publication the said Post Office Department recognizes, admits and treats, under the said act of March 3, 1879, as publications of the second class, divers other publications similar to your complainant's publications

and in respect of no condition established by the said act of March 3, 1879, to be distinguished from them.

Your complainants further say that among the publications so admitted, held, treated and transmitted by the Post Office Department are the following publications, to wit, The Black Cat, the All Story Magazine, and divers other publications, copies of which your complainant respectfully craves leave to refer to as exhibits and parts of this bill at the hearing of this cause.

And your complainant further says that the exclusion of its periodical publications aforesaid under the circumstances just mentioned constitutes a denial of justice and a violation of the
6 fundamental principle that the laws of the United States must be applied with equality to all citizens subject thereto; your complainant avers and complains that such exclusion denies to it the equal protection of the laws.

X. On, to wit, May 17, 1907, your complainant received from the Third Assistant Postmaster-General, a letter or notice that it would be granted a hearing at the office of said Third Assistant Postmaster-General Washington, D. C., at 2 o'clock, p. m., on Wednesday, June 12, 1907, to show cause why the authorization of the admission of such publication to the second class of mail matter under the act of March 3, 1879, should not be revoked and why the third class rate of postage should not be charged for the transmission of that class of mail, upon the following ground: "That the issues of such publication do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12 and 14 of the act of Congress of March 3, 1879 (Chap. 180, 1 supp. R. S., page 246) governing the mailable matter of the second class, but are in fact books, which, under section 17 of said act, are third class matter and chargeable, when sent in the mails, at the rate fixed by law for that class of matter." By said notice complainants were informed that their "answer, in writing, must be submitted on or before June 12, 1907," and furthermore, that "should they desire to avoid the expense and trouble incident to a trip to Washington their written answer would be given the same full and painstaking consideration as though they appeared in person or by representative." A copy of said notice in the case of Work and Win is annexed hereto and
7 marked Exhibit 2 and prayed to be read as a part hereof.

XII. In response to said notice your complainant did, by its representative, W. H. Heines, appear at the office of the Third Assistant Postmaster-General at 12 o'clock on June 11, 1907, and in anticipation of the hearing on the following day, filed a printed statement and argument in which the points to be urged against such rule were briefly set out and in which your complainants stated that if the Third Assistant Postmaster-General should not be satisfied from the consideration of said printed argument that the issues of the publication constituted a periodical publication, it requested a further opportunity to present argument. At the time of leaving said printed argument the representative of your complainant stated to the clerk of the Third Assistant Postmaster-General, the only person he could see, that he would return on the following

day, to wit, 2 o'clock p. m., June 12, 1907, to make further answer to the rule, and to participate in the hearing therein designated. On the day following, at the hour appointed in a citation in the case of the Tip Top Weekly also represented by said Heines, the representative of your complainants did appear at the office of the Third Assistant Postmaster-General in response to said rule to show cause, but he was unable to obtain an audience with or even to see the Third Assistant Postmaster-General. The representative of your complainants was, however, referred to the Superintendent of the Classification Division of the Post Office Department, who stated that he was not advised that he was to conduct a hearing and was
8 unprepared to proceed with it. Neither in the office of the Third Assistant Postmaster-General nor in the office of the Superintendent of the Classification Division was the Representative of your complainant informed or advised beyond what was already contained in the so-called rule to show cause of any ground, reason, matter or thing which was to be urged against the right of the said publications to admission to second class matter or of any ground, reason matter or thing to be alleged for their exclusion from said second class.

The said Superintendent thereupon made a note of the appearance of said Heines and said Heines stated he would remain at the New Willard Hotel to be within call.

XIII. Your complainant believes that the proceedings aforesaid, had in the office of the Third Assistant Postmaster-General, do not constitute a hearing according to the provisions and within the intent and meaning of the act of March 3, 1901 (31 Stats. L., 1107) whereby it is provided:

"When any publication has been accorded second class mail privileges the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

And your complainant is further advised and avers that the action hereinafter mentioned purporting to be based upon a hearing granted to your complainant on June 11, 1907, constitutes a deprivation of the property of your complainant without due process of law.

XIV. On July 30, 1907, your complainant received from the postmaster at New York a letter, under date of July 29, 1907, transmitting to your complainant a letter from the Third As-
9 sistant Postmaster-General, revoking the authorization for mailing the publication aforesaid at the second class rates of postage. Also a copy of the opinion of the Assistant Attorney General for the Post Office Department referred to in the letter of the Third Assistant Postmaster-General. By the said letter the said postmaster notified your complainant that any copies of these publications mailed thereafter would be subject to the postage rate for third class matter, one cent for each two ounces or fraction thereof, which must be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies. Copy of said letter is hereto annexed, marked Exhibit 3, and prayed to be read and considered as a part of this bill.

The copy of the letter of the Third Assistant Postmaster-General referred to in letter of the postmaster recited, under date of July 26, 1907, that the Assistant Attorney General for the Post Office Department, upon consideration of the arguments of the counsel for the publishers (by which your complainant supposes was meant the statement and argument submitted as aforesaid) had held that the publications in question were not "periodical publications" within the meaning of the law, but "books," and therefore not entitled to transmission at the second class rates of postage. The Third Assistant Postmaster-General proceeded to state that in that opinion he concurred, and accordingly decided that the issues of the "Work and Win," do not constitute newspapers or other periodical publications as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (chap. 180, I Supp. R. S., page
10 246), governing "mailable matter of the second class, but are, in fact, books which, under section 17 of said act, are third class matter, chargeable when sent in the mails at the rate fixed by law for that class of mail matter. And that therefore the authority granted for the acceptance of said publications for mailing at the second class rates of postage is hereby revoked."

A copy of said letter of the Third Assistant Postmaster-General is hereto annexed, marked Exhibit 7, and prayed to be read and considered a part of this bill. Enclosed in the said letter of the postmaster transmitting the decision of the Third Assistant Postmaster General was the opinion of the Assistant Attorney General for the Post Office Department referred to therein, upon the question of law whether your complainant's publication complied with the requirements of the act of March 3, 1879.

XV. Your complainant further avers that the question whether the said publication is a periodical publication within the meaning of the law and therefore entitled to transmission as second class matter is a pure question of law, to be determined by a comparison of the said publication itself with the condition set out in the said act of March 3, 1879.

Your complainant further avers that the decision of the said Third Assistant Postmaster General that the issues of the said publication do not constitute periodical publications as required by sections 7, 10, 12 and 14 of the said act, is a manifest error of law,
and should not avail to deprive your complainant of the
11 right to the transmission of said publication through the mails of the United States in accordance with the requirements, terms and provisions of said act.

Your complainant further avers and says that the said supposed decision of the Third Assistant Postmaster General, purporting to be based upon a construction of said act of March 3, 1879, is simply an arbitrary, capricious and unlawful conclusion, imposing upon the right to such transmission unspecified and undefined requirements in excess of and in addition to those established by the statutes of the United States, and unauthorized by the statute under which he assumed to act, and wholly beyond his power and jurisdiction.

Your complainant further avers that in pronouncing the decision

aforesaid the said Third Assistant Postmaster General proceeded upon no evidence or facts before him other than those apparent by a comparison of the publications themselves with the requirements of said statute.

And your complainant is further advised and avers that the said decision of the Third Assistant Postmaster-General is a departure from and reversal of the uniform, constant and established construction of said act, placed upon the same by the Post Office officials at the time of its enactment, and continued without interruption down to the time of the exclusion of this publication, as well as a reversal of the legislative construction thereof.

And your complainant is advised and believes that such decision,
being a clear mistake of law as applied to the apparent and
12 admitted facts, is absolutely null and void, and this honorable
court has accordingly power and jurisdiction to grant relief against the same.

XIV. Your complainant further shows that the postmaster of the United States for the city of New York, in pursuance of said supposed decision of the said Third Assistant Postmaster-General, immediately and before communicating said decision to complainant refused to accept the current issues of the publication aforesaid, for mailing in said postoffice at the second class rates of postage, and threatens now and hereafter at each successive issue of said publication to refuse to accept the same at said second class rates of postage.

XVII. Your complainant further shows that the publication aforesaid, is a periodical publication complies with all the conditions and requirements established by law for the admission of publications to the second class mail matter, and is a periodical publication within the intent and meaning of the said act of March 3, 1879, and therefore entitled to transmission as such. That the periodicity of the issue of said publication is real and not apparent, that the demand of the reader for said publication is a periodical demand, and that such demand can be met only by a periodical issue. That such publication has not only a legitimate list of subscribers, within the intent and meaning of the act of March 3, 1879, but has as a part thereof, a large number of individual reading subscribers who subscribe for the same for the periods for which subscriptions to periodical publications are usually taken; that the
periodicity of said publication is an essential element of its
13 character, and that if the said publication is denied admission to the mails as a periodical publication it would be impossible for your complainant to continue the publication thereof or to meet by any other form of publication the demand therefor. Your complainant further says that the copies of Work and Win circulated through the mail are practically all current copies and not back numbers; that the only back numbers so transmitted are a minute fraction of the total issue not in excess of the usual demand for back number- of periodicals. The said publication can be furnished to the subscribers and readers thereof only by means of the recognized news agencies and through the mails of the United

States; that if the second class mailing privilege is taken away from said publication your complainant will be unable to send said publication to various parts of the United States where the only possible means of communication with the subscriber is through the mails of the United States, such exclusion from the mails will amount to an absolute prohibition and interdict upon the circulation and distribution of said publication.

XVIII. Your complainant further avers that the said publication is principally devoted to literature and contains, in each successive issue thereof, continued juvenile fiction of literary merit; that such literature is pure and wholesome in tone, and so far as it deals with adventure deals with it in the same way and in the same spirit in which it is dealt with by the recognized masters of juvenile fiction. Your complainant further avers that the rest of the contents of said publication is selected miscellany usual to periodicals, and
14 that in no respect does any of the contents contravene any provisions of the postal laws of the United States.

XIX. Your complainant, relying upon the right to have its said publication transmitted through the mails of the United States upon no other condition than compliance with the statutes of the United States in that regard, has proceeded from time to time to invest large sums in the conduct, management, and development of the business of printing and publishing said weekly publication; to that end it has at great expense installed machinery and appliances suitable for no other purpose than the production of said publication; that in the said invalid order of the Third Assistant Postmaster General is put into execution by the postmaster at New York, not only will your complainant be compelled to suspend the publication of said publication, but the machinery and appliances aforesaid will become wholly useless to your complainant, and your complainant will be deprived of the value of the same, which value is in excess of the sum of ($5,000) Five Thousand Dollars.

XX. Your complainant says that its right to the transmission of its said publication through the mails of the United States at the second class rates of postage is a right of property dependent solely upon the laws of the United States in that regard, and that the decision of the Third Assistant Postmaster-General aforesaid, proceeding upon a clear mistake of law and imposing, as it does, unnamed and unspecified requirements beyond compliance with the provisions of the statutes of the United States will, if the same be put
15 into execution by the postmaster of the City of New York, as he now threatens to do, take from your complainant the right conferred upon it by the said statutes to the transmission of the publication aforesaid, and thus deprive it of its property without due process of law, contrary to the provisions of the Constitution of the United States in that regard.

And your complainant further avers that the said property right to the transmisson of the said publication at the second class rates of postage, irrespective of the value of the machinery and appliances aforesaid, exceeds in value the sum of Five Thousand Dollars ($5,000).

POOR COPY

For as much as your complainant is without a plain, adequate and complete remedy at law, and because if remediable at law relief could only be obtained by a multiplicity of suits, your complainant prays

1. That the United States writ of subpœna may issue to the defendant, commanding and enjoining him to appear at a date named therein and answer the exigencies of this bill.

2. That your complainant may be declared entitled to have the publication aforesaid entered, received and transmitted through the mails as mailable matter of the second class under the provisions of the act of Congress approved March 3, 1879, and at the rate provided by law for mailable matter of that class.

3. That it may please this honorable court to issue an injunction restraining the defendant, his agents and subordinates, from revoking the authority heretofore granted for the acceptance of
16 the publication aforesaid for mailing at the second class rates of postage, and requiring and commanding said defendant, his agents and subordinates, to receive the said publication and transmit the same through the mails of the United States as mailable matter of the second class and at second class rates.

4. That it may please the court also to grant a preliminary restraining order and injunction, restraining the said defendant, his agents and subordinates, as hereinbefore prayed, during the pendency of this suit.

5. That your complainant may have such other and further relief as in equity it may be entitled to and as to the court may seem meet and proper.

FRANK TOUSEY, *Publisher*,
By SINCLAIR TOUSEY, *President*.

In presence of

WM. H. ROCKWOOD.

H. H. GLASSIE,
J. J. DARLINGTON,
Sol'rs for Complainant.

STATE OF NEW YORK,
City & County of New York, ss:

Personally appeared Sinclair Tousey and made oath that he is now and for several years last past has been president of "Frank Tousey, Publisher," the corporation named as the complainant in the above bill, and that by means of his office he has particular knowledge of the matters stated in said bill, and that he has read the above bill by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, save only as to the matters therein stated upon the information and belief of the
17 complainant, and as to these matters he is so informed and believes them to be true.

SINCLAIR TOUSEY.

Subscribed and sworn to before me this 7th day of August, 1907.

[SEAL.]

WM. H. ROCKWOOD,
Notary Public for N. Y. Co.

18 EXHIBIT No. 1.

27280.

TOUSEY, Publisher,
v.
MEYER, Postmaster-General.

3505.

Certificate of Entry of Publication as Second-Class Matter.

POST OFFICE AT NEW YORK, N. Y.,
December 8th, 1898.

I hereby certify that the Work and Win a Weekly published at this place, has been determined by the Third Assistant Postmaster to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. VAN COTT,
Postmaster.
Per E. M. MORGAN,
Assistant Postmaster.

19 EXHIBIT No. 7.

C. N. 31271.

(Copy.)

Post Office Department,
Third Assistant Postmaster General,
Division of Classification.

WASHINGTON, *July* 26, 1907.

Postmaster, New York, N. Y.

SIR: In connection with the rule to show cause, you are informed that a hearing was given to the publishers of "Pluck and Luck," "Secret Service, Old and Young King Brady Detectives," "Work and Win," and "The Liberty of '76" at this Office on June 12, 1907.

The arguments of the counsel for the publishers were considered and submitted to the Assistant Attorney General for the Post Office Department, who held that the publications in question were not

"periodical publications" within the meaning of the law, but "books" and therefore not entitled to transmission at the second class rates of postage.

In this opinion I concur and accordingly decide that the issues of "Pluck and Luck" "Secret Service, Old and Young King Brady Detectives," "Work and Win" and "The Liberty Boys of '76'" do not constitute newspaper or other periodical publications as required by sections 7, 10, 12 and 14 of the Act of Congress of March
20 3, 1879 (ch. 180, 1 Supp., R. S., page 246), governing "mailable matter of the second class," but are in fact books, which, under section 17 of said Act, are fixed by law for that class of mail matter.

Therefore, the authority granted for acceptance of "Pluck and Luck," "Secret Service, Old and Young King Brady Detectives," "Work and Win" and "The Liberty Boys of '76'" for mailing at the second class rates of postage is hereby revoked and you are directed to enter that fact upon the records of your post office.

You will require postage at the third class rate—one cent for each two ounces or fraction thereof—to be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies of the publication hereafter mailed at your office.

A copy of the opinion of the Assistant Attorney General for the Post Office Department referred to is herewith enclosed to be handed to the publishers for their information.

Respectfully,

(Signed) A. L. LAWSHE,
Third Assistant Postmaster Gen'l.

21 *Rule to Show Cause.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Eq'y. 27280.

FRANK TOUSEY, Publisher,
v.
GEORGE VON L. MEYER, Postmaster General.

Upon consideration of the bill and the application for injunction pendente lite it is ordered, the 8th day of August, 1907, that the defendant show cause on Monday, August 12th, 1907, at 10 o'clock A. M. why injunction pendente lite should not be granted as prayed:

Provided that a copy of this order be served on the defendant, or the acting Postmaster General, on or before Friday the 9th day of August, 1907.

JOB BARNARD, *Justice.*

Marshal's Return.

Served copy of the within order on George von L. Meyer, Postmaster-General of the U. S. by service on A. L. Lawshe, acting Postmaster-General.

August 8, 1907.

AULICK PALMER, *Marshal.*
S.

22 *Restraining Order.*

Filed August 12, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the bill of complaint of the above named complainants and the rule to show cause issued thereon on August 8, 1907, and upon the appearance of the Attorney of the United States for the District of Columbia in response to said rule, it is this 12th day of August, 1907, by the court

Adjudged and ordered that the defendant, the Postmaster General, his assistants, deputies, agents and subordinates, be and they are hereby restrained and enjoined, until the further hearing of this cause upon motion of either party from revoking the authority heretofore granted for the acceptance of the publication "Work and Win" for mailing at the second class rates of postage, and that the said defendant, his assistants, deputies, agents and subordinates be and they are hereby restrained from refusing to accept said publication for mailing at the second class rates of postage and from
23 interfering with the transmission of the same at said second class rates under the provisions of the certificate of entry of December 8, 1898, Provided that the complainants give the usual undertaking required by Equity Rule No. 42.

JOB BARNARD, *Justice.*

Answer.

Filed November 5, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster General of the United States.

This defendant now and at all times hereafter, reserving all and all manner of benefit and advantage to himself of exception to the

POOR COPY

many errors and insufficiencies in said bill contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for him to make answer unto; answers and says:

I–III.

This defendant admits the allegations of paragraphs, one, two, and three of the bill of complainant, with the exception of
24 the allegation of paragraph three that complainant has been since the establishment of its publishing business, more than thirty-five years ago, "lawfully engaged in the business of publishing periodical publications similar to those hereinafter specifically mentioned," the import of which is that the publication entitled "Work and Win" is a periodical, and this he denies, and avers that while the publishing business of complainant may have been established more than thirty-five years ago as stated, said publication is not a periodical, but is in fact a book.

IV.

This defendant is informed and believes that the complainant is now and was at the time of the acts complained of, the sole owner, proprietor and publisher of the publication entitled "Work and Win;" that said publication was from the date of its establishment, to-wit, December, 1898, received and transmitted through the United States mails at the rates prescribed by law for matter of the second class, but denies that said publication is a periodical and avers on the contrary that it is in fact a book.

V.

This defendant is informed and believes that the publication designated "Work and Win" is regularly issued at stated intervals as frequently as four times a year, to-wit, at the stated interval of once a week, bears the date of issue, and is numbered consecutively, and for aught that he knows to the contrary has been so regularly and consecutively issued since its establishment to the present time; and has been and is now so regularly issued from the known
25 office of publication of the complainant; and admits that said publication is formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications. But this defendant avers that although said publication be regularly issued from the known office of complainant as frequently as four times a year, and be numbered consecutively and be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguishes printed books for preservation from periodical publications, and thus complies with the outward characteristics and conditions prescribed by law for mailable matter of the second class, nevertheless, internally, in substance and in general contents it does not have the characteristics of said class of mail matter, but is in fact a book, and as such is included in the third class of mail matter as designated by law.

This defendant further avers that said publication does not have the characteristics of the second class of mail matter as prescribed by law, in that there is no connection between the different numbers thereof in the nature of the articles appearing in them, and in that the publication implies no continuity of literary character, such as distinguishes periodical publications from books, but each publication, issue or so-called number is complete in itself, and save outwardly indicates no relation with prior or subsequent numbers, issues or publications; and that the only connection of the successive issues one with another is that each bears the title "Work
26 and Win," and the issues as they appear are numbered consecutively; all of which will appear by an examination of the copies of the publication filed with the said bill and with this answer as a part hereof, marked Exhibits, A, B, C, D, and E.

This defendant denies that said books are originated and published for the dissemination of information of a public character; and while it may be true that each of said books may be a work of literature itself, the defendant denies that the said books or any of them are devoted to literature in any proper or legal sense, or within the meaning of the Act of March 3, 1879. For aught that this defendant knows to the contrary, none of the said books so issued was or is designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

This defendant does not know of his own knowledge, and therefore can neither admit nor deny that the said "Work and Win" has a legitimate list of subscribers; but if this fact be competent for inquiry by this court, and be material, demands strict proof of the same. This defendant is informed and believes and avers, that none of the said several books or novels published under that designation are sent through the mails to individuals who subscribe for them for any period of time, but that all, or pratically all, of the copies of each of said books or novels so published are by the complainant, either directly or through agents, distributed to news agents or news dealers, who in turn sell them as books, singly and without relation to the other books or novels likewise published under the same designation. And this defendant says that by reason
27 of the manifest character of these publications as books, and not as successive parts of a continuous periodical, neither he nor his predecessors was ever called upon officially to inquire and determine whether or not the alleged periodical known as "Work and Win" had a legitimate list of subscribers; and he further submits that if the supposed right of complainant to transmit books published under the designation "Work and Win" is in any wise dependent upon the existence of a legitimate list of subscribers, the question of the extent of such list is one of fact, for the cognizance of the Postmaster General.

Further answering the allegations contained in paragraph five, this defendant denies that the publication designated "Work and Win" has complied or is complying with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second class, and denies that said publication is matter of the second class as alleged.

POOR COPY

VI–VII.

This defendant is informed and believes, that the allegations of paragraphs six and seven are true, with the exception of the allegation that the acts of this defendant were wrongful; and this he denies and says that he is informed and believes that said acts were lawful and just, and wholly within his authority and jurisdiction.

VIII.

This defendant is not informed as of his own knowledge of the conditions and circumstances surrounding the passage of the
28 Act of March 3, 1879, and can neither admit nor deny the allegation that publications similar to "Work and Win" were as alleged, regularly admitted, received and transmitted through the mails of the United States as periodical publications and mailable matter of the second class prior to said act; but this defendant denies that such publications have been at any time heretofore, or now are, by all publishers, news dealers and agents, as well as by the public in general, deemed, held, and regarded to be periodical publications and were ordinarily and usually spoken of and treated as such; and denies that it was in the light of such alleged universal recognition of the periodical character of such publications and of their rights to transmission at periodical rates in common with other periodical publications that the Act of Congress of March 3, 1879, was enacted; and denies that the definitions and conditions mentioned in said Act were expressly intended and designed to include and embrace publications of the character of "Work and Win."

This defendant submits that said Act was not intended, and the definitions and conditions mentioned therein were not intended and designed, either expressly or otherwise, to include and embrace publications of the character of that in respect of which this complainant has been excluded from the second class mailing privilege, to-wit: the publication entitled "Work and Win," but that said Act had in contemplation publications such as are commonly known as newspapers and magazines, published periodically—that is to say, at regular intervals, either daily, weekly, monthly or quarterly, for the dissemination of news and other information of instruc-
29 tive or educational value, or devoted to literature, or to the arts, sciences, or special industries; and that the circulation of publications of the class of "Work and Win," which have the characteristics of books and by section seventeen of said Act are designated as mailable matter of the third class, which, moreover, are not "devoted to literature," and if literature themselves are of an inferior order thereof, was not designed or intended to be encouraged by the extension to them of the special privileges authorized by sections 7, 10, 12 and 14 of said Act.

IX.

This defendant can neither admit nor deny the allegation that the Post Office Department did from and after the passage of said Act of March 3, 1879, admit, recognize, treat and transmit publica-

tions in all respects identical with the publication of complainant, but denies that such course, if pursued by said Department as alleged, was in recognition of any universal understanding of the terms "periodical publications," or of any universal understanding of the true intent and meaning of said Act. This defendant is informed, and so believing avers, that very many publications similar in their general characteristics to the publication of complainant were received and transmitted in the mails by the Post Office Department as matter of the second class prior to November, 1901, but that such classification and treatment of such publications were quite generally criticised as an abuse of the privileges accorded to periodical publications by said Act, and contrary to its true intent and purpose; and says that since said time very many such
30 publications have been excluded from the second class of mail matter, and none such has been entered as matter of said class. This defendant is further informed, and so believing avers, that such publications were received and transmitted as matter of the second class under mistake by said Department both of law and fact, and he is in no wise bound thereby.

This defendant denies that the publication of the complainant was on the 27th day of July, 1907, unlawfully and wrongfully excluded from the second class of mail matter, and avers on the contrary that the order of said date excluding said publication from the mails as matter of the second class was lawfully and regularly issued in due course and after hearing given to the complainant.

X.

This defendant denies that the publications referred to by complainant as "The Black Cat" and the "All-Story Magazine" are similar in respect of all the conditions established by the said Act of March 3, 1879, to the publication of complainant and not to be distinguished therefrom; and he denies also that the exclusion of said publication from the second class of mail matter constitutes a discrimination against said publication or a denial of justice to the complainant, or a violation of the fundamental principle that the laws of the United States must be applied with equality to all its citizens, and that by said exclusion the complainant is deprived of the equal protection of the laws. This defendant avers on
31 the contrary that the exclusion of the said publication was in conformity with the established policy of the Post Office Department, designed to carry out the provisions of the Act of March 3, 1879; and that in pursuance of said act and policy, no publication possessing the characteristics of books may be received as matter of the second class and so transmitted in the mails, but that all such publications shall be classified according to their substance and real character and admitted to the mails for transmission as matter of the third class in pursuance of section 17 of said Act, and all such publications are being excluded from the second class of mail matter in the usual course as they come to the attention of the Post Office Department.

POOR COPY

XI.

This defendant admits the allegations of paragraph eleven, except as to the statement that "by said notice complainants were informed that their 'answer in writing must be submitted on or before June 11, 1907,'" and this he denies, and avers that said hearing was fixed for Wednesday, June 12, 1907.

XII.

This defendant is advised and so believing avers that on June 11, 1907, counsel for complainant, to wit, W. H. Heines, Esq., appeared at the office of the Third Assistant Postmaster General and stated to his secretary that he desired to see that officer in reference to the publication of complainant which had been excluded from the second class of mail matter; that counsel was informed by said secretary that the Third Assistant Postmaster General was
32 engaged, or was not at that moment in his office; that counsel left with the statement that he would call the next following day; that on the next day, to wit, June 12, he called again at the office of the Third Assistant Postmaster General, and his said secretary, on going to the room of that officer, found him engaged in a conference; that on being informed that counsel representing complainant in the matter of the exclusion of its said publication had called and desired to see him, the Third Assistant Postmaster General directed his secretary to invite counsel to call on the Superintendent of the Division of Classification and to instruct said Superintendent to go over with him any matter that he desired to discuss with reference to said publication, note his appearance in response to the citation issued on May 15, 1907, to complainant to show cause why its said publication should not be denied transmission in the mails as matter of the second class, and that if after conferring with said Superintendent counsel desired to see the Third Assistant Postmaster General personally, the latter would see him; that this defendant is informed and believes that said secretary fully carried out these instructions; that counsel submitted to said Superintendent in answer to said citation a printed statement and argument on behalf of the complainant, to a copy of which printed statement and argument annexed as "Exhibit F" this defendant craves leave to refer as showing that it is responsive to said citation and undertakes to answer the charge of the Third Assistant Postmaster General that the publication of complainant in question, to wit, "Work and Win" was not a periodical publication as designated
33 and defined by the Act of March 3, 1879, but that the respective numbers thereof were in fact books. This defendant is further informed and believes that said Superintendent of the Division of Classification later advised the said secretary of the Third Assistant Postmaster General by telephone that counsel for complainant had called and he had noted his appearance; and that at the same time said Superintendent inquired whether the Third Assistant Postmaster General desired to see counsel; that said secretary replied that he did not unless counsel desired to see him as he had nothing special to say to him; and that the said Superintendent

replied that counsel for the complainant did not have anything further which he desired to communicate to the Third Assistant Postmaster General. This defendant is advised and so believing avers that it was and is the understanding of the Third Assistant Postmaster General and of the Superintendent of the Division of Classification, that counsel for the complainant desired the printed argument submitted on behalf of the complainant to be taken as its answer to the citation issued by the Third Assistant Postmaster General, and that counsel did not desire to be heard orally in respect of said citation, but had included in the said printed argument the full reply of complainant in the premises.

This defendant avers that by the regulations of the Post Office Department (Edition of 1902), section 19, paragraph 8, said Superintendent of Classification "is charged with the consideration of all questions relating to the classification of matter admissible to the mails, including the determination of the admissibility of
34 publications to the second class of mail matter and their right to continue therein," and that the duties so assigned to him by necessary implication include general authority to hold hearings of the character required by the Act of 1901; and is advised and believes that said Superintendent was moreover specifically instructed by direction of the Third Assistant Postmaster General to hear counsel for the complainant in response to said citation in respect of "Work and Win," and that in pursuance of said instruction received the printed statement and argument prepared in answer to said citation, and offered to receive and did receive all other papers and matters submitted by counsel in its behalf, and offered to hear counsel at length orally if desired. But this defendant is further advised and believes that the Third Assistant Postmaster General was ready and willing nevertheless to hear counsel orally and fully on the day fixed in said citation, to wit, the 12th day of June, 1907, and that counsel had full opportunity to be so heard on said day had he so desired.

XIII.

This defendant is informed and believes that before the issuance of the order excluding said publication of the complainant from the second class of mail matter, full opportunity was given complainant and its counsel to be heard, and that there was in fact a hearing in respect of said matter, conforming in all respects with the intent and purpose of the Act of March 3, 1901 (31 Stats. L. 1107).

This defendant is further informed and so believes and
35 avers that the privilege of having publications complying with the conditions of second class matter as defined in the Act of March 3, 1879, transmitted at the second class rate of postage is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and its determination is within the judgment and discretion of the Postmaster General for the time being; and is further advised, and so believing avers, that there was in the case of this publication, no deprivation of property of the complainant.

XIV.

This defendant admits the allegations of paragraph fourteen, and says that it was his duty to examine into all the facts and circumstances which determine whether the publication of complainant complies with the statutory conditions for acceptance at the second class postage rates, and as the result of the inquiry into such facts and circumstances on and after hearing to complainant as aforesaid, this defendant, acting through the Third Assistant Postmaster General, has found said publication not to be entitled to admission to the mails at the second class rate; and says that it is his intention in pursuance of such finding and unless restrained by this court, hereafter to decline to receive said publication for transmission in the mails at said rate of postage.

XV.

36 This defendant is informed and believes that the question whether the publication of complainant designated "Work and Win" is a periodical publication within the meaning of the law and so entitled to transmission as second class matter, is a mixed question of law and fact to be determined upon a comparison of the said publication itself with the conditons set out in said Act of March 3, 1879, and consideration of all the facts and circumstances surrounding its publication. This defendant is informed and believes that the decision of the Third Assistant Postmaster General that the issues of the said publication do not constitute periodical publications as required by Sections 7, 10, 12 and 14 of the Act of March 3, 1879, is not an error of law as alleged, but is the correct and true finding upon the law and facts. This defendant denies that said decision of the Third Assistant Postmaster General is simply an arbitrary, capricious and unlawful conclusion, imposing upon the right to transmit matter of the second class unspecified and undefined requirements in excess of and in addition to those established by the statutes of the United States and unauthorized by the statute under which he assumed to act and wholly beyond his power and jurisdiction; and avers on the contrary that said decision is the just and proper conclusion upon the law and facts, reached in a fair, open and judicial manner and with due regard to all the rights and privileges of the complainant, and fully authorized by the statutes of the United States defining mail matter of the second class and regulating its transmission.

37 This defendant is further informed and so believing avers, that in deciding the question whether the publication of complainant is a periodical publication within the meaning of the law, the Third Assistant Postmaster General considered not only copies of successive numbers of the publication by comparison with the requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry.

This defendant is further advised, and so believing avers, that the Third Assistant Postmaster General, after careful inquiry into the law and facts bearing upon the question whether the said publication of complainant is a periodical publication as defined by the

Act of March 3, 1879, and before taking action upon the conclusi
which he had reached in respect of said question, to assure hims
of the correctness of such conclusion and that it was just and in
cordance with law, requested and received the opinion of the
sistant Attorney General for the Post Office Department upon
matter, the same being the opinion to which the complainant ref
in his said bill; and further avers that the action of the Third
sistant Postmaster General in excluding "Work and Win" from
second class of mail matter was not taken arbitrarily or capricio
but upon deliberate and careful consideration of the whole subj

This defendant is informed and believes that his action in
cluding said publication from the privileges of transmission in
mails at the second class postage rates is not contrary to the prac
of his predecessors in office, but is in full accord and harmony w
the practice established on or about November, 1901, by his pre
cessor, Postmaster General Smith, and uniformly pursued si
that time, and avers further that a large number of publi
38 tions similar to "Work and Win" have been denied
second class mailing privilege since said time, to-wit, Nov
ber, 1901, among which were "Arrow Library," "Medical Librar
"Log Cabin Library," "Eagle Series," "Broad Brim Weekly" a
other books published by Messrs. Street and Smith; "Beadle's H
Dime Library," "Beadle's Boys' Library" and "The Dime Librar
published by M. J. Ivers & Company; "Modern Library" publis
by the Modern Stories Publishing Company; "The Family Libra
published by The Family Library Company; "The Arm-Ch
Library" and "The Leisure Hour Library" published by F.
Lupton; all of New York City, to copies of which publications
nexed hereto as Exhibit G this defendant refers and prays that sa
be taken as a part hereof.

This defendant is further informed and believes that the adm
sion and transmission of mailable matter under the terms prescri
by the statutes of the United States is a continuous administrat
act, the performance of which is devolved by law upon this defe
ant, and that in performance of this duty this defendant is in
wise bound or controlled by the action of his predecessors in off
nor does the admission and transmission by one Postmaster Gen
of mailable matter of a certain kind as of the second or any ot
class constitute any obligation, contractual or otherwise, upon
United States or its officers thereafter to admit similar publicati
under the same name as of the same class and at the same rate
postage.

This defendant is informed and believes that said decision is
a mistake of law, but on the contrary is in full accorda
39 with law and justified and demanded by the law and f
in respect of which it was pronounced.

XVI.

This defendant is informed and believes that the allegations
paragraph sixteen are true.

XVII.

For answer to paragraph seventeen, this defendant denies that the publication of complainant is a periodical publication, and denies that it complies with the conditions and requirements established by law for the admission of publications to the second class of mail matter; and further denies that the periodicity of issue of said publication is real and that the demand therefor is a periodical demand and can be met only by a periodical issue; and avers on the contrary that essentially the publication is a book and its issuance periodically is designed merely to disguise the true character of each number of the publication, which is that of a separate and independent work and in aid of the original purpose to simulate a periodical publication in order to obtain the benefit of second class rates of postage. This defendant further avers that the contents of each book or number have no relation to the contents of any other number, but are wholly independent thereof and distinct therefrom. This defendant can neither admit nor deny the allegations that if said publication is excluded from the mails it would be impossible for complainant to continue its issuance or to meet by any other form of publication the demand therefor, and submits that the same are wholly irrelevant and immaterial; but for anything this
10 defendant knows to the contrary the same may be true as stated. This defendant denies that the copies of "Work and Win" circulated by mail are practically all current copies and not back numbers, and denies that the only back numbers so transmitted are a minute fraction of the total issue and not in excess of the usual demand for back numbers of periodicals; and avers on the contrary that a very considerable proportion of copies of said publication circulated by mail are back numbers, and further avers and says that the proportion of back numbers so transmitted is much in excess of that of genuine and real periodicals; and this defendant refers to prominent advertisements of back numbers appearing in each number of "Work and Win," annexed as Exhibits A, B, C, D, and E, and prayed to be taken as a part hereof, as tending to show that complainant circulates back numbers of said publication very largely by mail.

This defendant denies the allegation of paragraph seventeen that if the second class mailing privilege is taken away from the said publication, complainant will be unable to send the same to various parts of the United States where the only possible means of communication is through the mails of the United States, and that such exclusion from the mails will amount to an absolute prohibition and interdict upon the distribution and circulation of said publication, and avers on the contrary that the only effect of the exclusion of said publication from the second class mailing privilege will be to require the payment of postage upon copies thereof at the third class rate instead of the second class rate.

As to the allegation of paragraph seventeen that Work and Win has a legitimate list of subscribers, this defendant refers to
11 his answer to the same allegation as contained in paragraph five of said bill.

XVIII.

This defendant denies each and every one of the allegations paragraph eighteen; and avers and says on the contrary that sa publication is not "devoted to literature;" that it implies no co tinuity of literary character and no connection of successive issu one with another, but that each number of such publication is co plete within itself and indicates no relation to prior or subseque numbers; and this defendant further avers that the contents of sa publication, while not impure in the sense of being indecent or i moral, are nevertheless unwholesome and positively harmful in the influence upon the class of readers to which it is addressed almo exclusively, to-wit, boys of tender age and immature minds, wh receive therefrom false impressions of the duties of life, are fill with the desire of adventure and become restive and discontent under the restrictions and discipline properly imposed upon them parents or others to whom they should naturally give obedience a look for guidance.

XIX.

This defendant denies that the order of the Third Assistant Po master General excluding "Work and Win" from the second cla mailing privilege is invalid, and avers on the contrary that sa order is fully warranted and valid in law. This defendant is unab to admit or deny the allegation that if said order is put in
42 execution by the postmaster at New York the complaina will not only be compelled to suspend the issuance of publication but its machinery and appliances necessary to produ the same will become wholly useless and complainant be depriv of their value, which is in excess of the sum of $5,000.00; but su mits that said allegation is wholly irrelevant and immaterial. however, this court should hold that said allegation is in any wi material to the issues in this cause, this defendant demands stri proof thereof.

XX.

This defendant is informed and so believing avers that the tra mission of matter in the mails at the second class postage rates in pursuance of a mere privilege conferred by statute upon public tions meeting the statutory requisites and conditions, and is not right of property as alleged by the complainant; and that the e clusion of the publication of complainant from the second cla mailing privilege for the reason that it does not comply with su requisites and conditions neither deprives the complainant of a property or right of property, nor any right conferred upon it the statutes or constitution of the United States.

This defendant can neither admit nor deny the allegation th the privilege of transmitting "Work and Win" in the mails at t second class postage rates exceeds in value to the complainant t sum of $5,000.00 irrespective of the value of the machinery a appliances used in its publication; but submits that said allegati

is wholly irrelevant and immaterial to the issues in this cause.
43 If however this court should hold said allegation to be in any wise material to said issues, this defendant demands strict proof thereof.

Answering generally to the whole bill, this defendant says that as Postmaster General of the United States, he is charged by law with the duty of superintending generally the business of the Post Office Department and administering all laws relating to the postal service; that among his duties is that of classifying the mail matter offered for transmission through the mails of the United States and distributing the same into the respective classes created and designated by Congress; in the course of which classification it devolves upon him to investigate and ascertain whether matter transmitted as of the second class does or not comply with the conditions which by law are prescribed for matter of such class; that such investigation exercised by him as the head of an Executive Department in the ordinary discharge of his duty, requires an inquiry into the facts and an examination of the evidence and an interpretation of the law, and that in the case of the publication hereinbefore mentioned, after due notice to the complainant and a full, fair and impartial hearing and an examination into facts and evidence relevant and material to the inquiry, and a construction of the law and its application to the facts in evidence, this defendant found and determined that "Work and Win," published by the complainant, does not have the characteristics prescribed by statute for matter of the second class, but on the contrary possesses the characteristics of third class matter, and, not fulfilling the conditions established by law for matter of the second class, was not entitled to admission to the
44 mails at the second class postage rate, and that the certificate admitting such publication as matter of the second class should for that reason be revoked and become inoperative in the future; which said finding, determination and decision involved the exercise of judgment and discretion on the part of this defendant and of the Third Assistant Postmaster General, acting in that behalf, and for that reason as this defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant further submits that the complainant in and by its said bill and the matters and things set forth therein does not make or state such a case as would entitle it to the relief thereby prayed, and as to so much of the said bill as prays an injunction against the enforcement by this defendant of his decision that the said publication is not entitled to transmission at the second class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review or afford relief against the decision and action of the head of an Executive Department in a matter involving the exercise of his judgment and discretion; and submits that the publication of said complainant is of such a character as to work moral harm and injury to those into whose hands issues thereof are destined to fall, and whose minds are open and receptive to such improper influences,

and that it is not such as should have the aid or assistance of a court of equity in continuing the exercise of a privilege intended to make possible the widest and freest dissemination of information
45 of general interest or instructive or educational value; and this defendant hopes he will have the same benefit of these defences as if he had formally demurred to the said bill upon the ground thereof.

Having fully answered, this defendant prays to be hence dismissed with his reasonable costs.

G. v. L. MEYER,
Postmaster General.

DANIEL W. BAKER,
U. S. Att'y.
RICHARD W. WEBSTER,
Special Counsel.

DISTRICT OF COLUMBIA, *ss:*

George v. L. Meyer Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

G. v. L. MEYER,
Postmaster General.

Subscribed and sworn to before me on this second day of November, A. D. 1907.

[SEAL.] GEORGE G. THOMSON,
Notary Public.

My commission expires March 14, 1911.

46 *Joinder of Issue.*

Filed December 3, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
GEORGE VON L. MEYER, Postmaster General of the United States.

Now comes the Complainant in the above entitled cause and joins issue on the answer of the Defendant filed herein.

HENRY H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainant.

POOR COPY

7 *Order Substituting Frank H. Hitchcock as Defendant.*

Filed May 4, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
GEORGE VON L. MEYER, Postmaster General of the United States, Defendant.

Upon consideration of the retirement from office of Postmaster General of George von L. Meyer and the motion that his successor Frank H. Hitchcock be substituted as defendant, it is this fourth day of May, 1909, by the court ordered:

That Frank H. Hitchcock, Postmaster General of the United States, be and he is hereby substituted as defendant in this cause, and that the same be maintained against him as the successor in office of the said George von L. Meyer.

WRIGHT, *Justice.*

48 *Final Decree.*

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation,
v.
FRANK H. HITCHCOCK, Postmaster General of the United States.

This cause came on to be heard upon the pleadings and evidence, and was argued by counsel for the respective parties and considered by the Court; whereupon the court finds that the order of July 26th, 1907, recited in the bill was issued without a hearing, such as provided for by law; whereupon it is this 11th day of June, 1909, by the Court ordered, adjudged and decreed that the defendant, Frank H. Hitchcock, Postmaster General, his agents and subordinates, be and they hereby are enjoined from enforcing the order of July 26th, 1907, revoking the authority granted for acceptance of the Work and Win, a weekly, for mailing at the second class rates of postage; and from refusing to receive the issues of said publication and to transmit the same through the mails of the United States as mailable matter of the second class. None of the other issues raised by the pleadings are determined.

WRIGHT, *Justice.*

49 From the above decree the defendant in open court herewith prays an appeal to the Court of Appeals which is hereby allowed.

THOS. H. ANDERSON, *Justice.*

Suggestion of Interest of the United States.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

Now comes the Attorney of the United States in and for the District of Columbia, and suggests to the Court that it appears by the pleadings and record herein that suit is brought against the defendant, the Postmaster General of the United States, in his official capacity as an officer of the United States, and that the said suit is one solely against the said United States, its interests and its properties, and that the said defendant is not sued in his personal capacity, and that he has no personal interest or concern therein.

And the said Attorney of the United States in and for the District of Columbia hereby makes due suggestion to the Court that
50 the appeal prayed and taken herein from the decree of the Court entered herein on the eleventh day of June, A. D. 1909, was taken by direction of the Attorney General of the United States, and that the said case, and the said appeal, are to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

Suggestion of Interest of U. S. as to Taking Appeal.

Filed June 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27280.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The Clerk of the Court will please take notice that the appeal prayed and taken herein on the eleventh day of June, A. D. 1909,

POOR COPY

from the decree of the Supreme Court of the District of Columbia issuing an injunction, entered the eleventh day of June, A. D. 1909, by the defendant, is taken by direction of the Attorney General of the United States and by the Postmaster General of the United States, and is to be treated in all respects as an United States case.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

51 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 23, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. In Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

The following pleadings and papers are hereby designated by counsel for defendant as the record to be made and filed in the Court of Appeals for the District of Columbia, in the appeal prayed and taken herein from the judgment of the Supreme Court of the District of Columbia, on the tenth day of June, A. D. 1909, granting the injunction prayed for in the bill.

1. The bill of complaint, with exhibits.
2. The rule to show cause.
3. The restraining order.
4. The answer of defendant, with exhibits.
5. Replication.
6. Testimony.
7. Order substituting Frank H. Hitchcock, vice Meyer, Postmaster-General, resigned.
8. Decree.
9. The suggestion of the interest of the United States in
52 the suit.
10. The notice to the Clerk that the appeal was taken by the direction of the heads of Departments of the United States, and is, and is to be treated as, an United States case.
11. And this order.

DANIEL W. BAKER.
Solicitor for Defendant.

Further Directions for Making up Record on Appeal.

Filed July 2, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. In Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General of the United States, Defendant.

In addition to the pleadings and papers designated by counsel for the defendant, the clerk will please include, in the record to be made up and filed in the Court of Appeals, the following:

1. Evidence offered in the cause of Ormond G. Smith, et al., vs. Frank H. Hitchcock, Postmaster General, in Equity No. 27279 as per stipulation in this cause.

53 2. And this order.

J. J. DARLINGTON.
H. H. GLASSIE.
Solicitors for Complainant.

Memorandum.

July 14, 1909.—Time in which to file Transcript of Record in Court of Appeals is hereby extended to, and including, the tenth day of September, A. D. 1909.

Stipulation.

Filed August 12, 1909.

In the Supreme Court of the District of Columbia.

No. 27280. Equity.

FRANK TOUSEY, Publisher, a Corporation, Complainant,
vs.
FRANK H. HITCHCOCK, Postmaster General, Defendant.

It is, this 6th day of August, A. D. 1909, hereby stipulated by and between the parties to the above cause, by their respective solicitors, subject to the approval of the Court of Appeals, that, from the transcript of the record for appeal to the said Court of Appeals,

54 all the exhibits may be omitted, with the right to any party to produce and use the originals thereof at the hearing in said Court of Appeals, with like effect as if the same were included in the transcript of the record filed in that Court and in the printed

POOR COPY

copies thereof required by the rules, the printing thereof being dispensed with, and that the same procedure shall obtain in the case of any appeal in this cause to the Supreme Court of the United States, subject to the approval of that Court. It is further stipulated that the transcript of the record and exhibits in the case of Ormond G. Smith et al. vs. Frank H. Hitchcock, Postmaster General, Equity No. 27,279, shall be considered as a part of the record in this cause, for all purposes of appeal in this cause.

H. H. GLASSIE,
J. J. DARLINGTON,
Solicitors for Complainant.
DANIEL W. BAKER,
Solicitor for Defendant.

55 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 54, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 27280, wherein Frank Tousey, Publisher, a corporation, is Complainant and Frank H. Hitchcock, Postmaster-General of the United States, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of September, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2060. Frank H. Hitchcock, &c., appellant, vs. Frank Tousey, &c. Court of Appeals, District of Columbia. Filed Sep. 10, 1909. Henry W. Hodges, clerk.

TUESDAY, *February 8th, A. D.* 1910

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,

and

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

FRANK TOUSEY, Publisher, a Corporation.

The argument in the above entitled causes was commenced by Mr. James J. Britt, attorney for the appellant.

WEDNESDAY, *February 9th, A. D.* 1910

No. 2059.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. GOULD, Trading under the Firm Name of Street & Smith,

and

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

FRANK TOUSEY, Publisher, a Corporation.

The argument in the above entitled causes was continued by Mr. James J. Britt, attorney for the appellant, and by Messrs. J. J. Darlington and H. H. Glassie, attorneys for the appellees, and was concluded by Mr. D. W. Baker, attorney for the appellant.

POOR COPY

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
FRANK TOUSEY, Publisher, a Corporation.

Opinion.

Mr. Justice Robb delivered the opinion of the Court:

The publication here involved, "Work and Win," is not materially different from the "Tip Top Weekly" considered in the preceding case, and by stipulation the same testimony that was considered in that case was considered in this. For the reasons assigned in that case we reverse the decree in this, with costs, and remand the case for further proceedings.

Reversed.

TUESDAY, *March 1st, A. D.* 1910.

January Term, 1910.

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
FRANK TOUSEY, Publisher, a Corporation.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings.

Per Mr. JUSTICE ROBB,
March 1, 1910.

FRIDAY, *March 11th, A. D.* 1910.

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,
vs.
FRANK TOUSEY, Publisher, a Corporation.

The motion to modify the decree in the above entitled cause was submitted for the consideration of the Court by Mr. H. H. Glassie, of counsel for the appellee, in support of motion.

FRIDAY, *March 11th, A. D.* 1910.

January Term, 1910.

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

FRANK TOUSEY, Publisher, a Corporation.

Upon motion of the attorneys for the appellees herein, a decree and order passed in the above entitled cause on the first day of March, A. D. 1910, is hereby amended and modified as follows: That portion of the decree and order directing the cause to be remanded to the lower court for further proceedings is hereby stricken out, and in place thereof the said decree shall read, "that the bill of complaint in said cause, be and it is hereby dismissed, and the injunction issued on June 11th, 1909, be, and the same is hereby, dissolved; provided, however, that upon the appellees herein furnishing bond in the sum of $10,000 to be approved by the Court, the said injunction is to continue in force pending the appeal to the Supreme Court of the United States."

This decree was submitted by agreement of counsel and is entered as prepared by them.

SETH SHEPARD,
Chief Justice of the Court of Appeals.

FRIDAY, *March 11th, A. D.* 1910.

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States, Appellant,

vs.

FRANK TOUSEY, Publisher, a Corporation.

On motion of Mr. H. H. Glassie, of counsel for the appellee, in the above entitled cause, It is ordered by the Court that said appellee be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars, the injunction bond by the amended decree filed herein being fixed at the sum of ten thousand dollars.

In the Court of Appeals of the District of Columbia, January Term, A. D. 1910.

No. 2060.

FRANK H. HITCHCOCK, Postmaster General of the United States,

vs.

FRANK TOUSEY, Publisher, a Corporation.

Know all men by these presents, That we, the undersigned, Frank Tousey, Publisher, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of Ten Thousand Dollars ($10,000.00), to be paid to the United States of America. To which payment well and truly to be made we bind ourselves, and each of us, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of March, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named Frank Tousey, Publisher, a corporation, has applied for an appeal to the Supreme Court of the United States from a decree of the Court of Appeals of the District of Columbia, and is desirous of continuing in effect, pending said appeal, a certain injunction granted in the above entitled cause by the Supreme Court of the District of Columbia on June 11th, 1909, whereby the Postmaster-General of the United States was restrained and enjoined from revoking the authority granted for the acceptance of "Work and Win," a publication issued by the said Frank Tousey, Publisher, a corporation, for mailing at the second class rates of postage.

And whereas, security is desired by the United States of America that the said Frank Tousey, Publisher, a corporation, shall well and truly pay or cause to be paid to the United States of America the aggregate difference between the postage chargeable at the third class rate of postage, and that charged at the second class rate of postage, on the copies of the publication known as "Work and Win," which, at or upon the final termination of the suit between the aforesaid parties in the Supreme Court of the United States, or in any other court, shall have been deposited in and transmitted through the mails since the first day of March, A. D. 1910.

Now, therefore, the condition of this obligation is such, That, if the above named Frank Tousey, Publisher, a Corporation, shall prosecute the said appeal to effect in the Supreme Court of the United States, and, if they shall fail to make good their appeal, answer all damages which the United States of America may sustain from the first day of March, A. D. 1910, in consequence of the said injunction being continued in force pending this appeal, and further make due payment for all damages to the United States of America accruing from the aggregate difference between the postage chargeable at the third class rate of postage and that charged at the second

class rate of postage on the said publication, "Work and Win," which, at or upon the final termination of the suit between the aforesaid parties, in the Supreme Court of the United States, or another court, shall have been deposited in and transmitted through the mails since the first day of March, A. D. 1910, then this obligation shall be void; otherwise the same will be and remain in full force and virtue.

Sealed with our seals, and dated this 16th day of March A. D. 1910.

FRANK TOUSEY, *Publisher.*
SINCLAIR TOUSEY, *President.* [SEAL.]
CHARLES E. NYLANDER, *Sec'y.* [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]
By HORACE P. HOLLISTER, [SEAL.]
Resident Vice President.

Attest:
MARSHALL L. BROWER,
Resident Assistant Secretary.

Witness-:
L. SENABEUS.
CHARLES UNGER.
T. J. SAVAGE.
LOUIS PAPEN.
As to Surety.

[Seal of Frank Tousey, Publisher.]

Approved by
SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

March 22, 1910.
Satisfactory.
F. SPRIGG PERRY,
Ass't U. S. Att'y.

[Seal of Frank Tousey, Publisher.]

(Endorsed:) In the Court of Appeals of the District of Columbia Frank H. Hitchcock, Postmaster General of the United States vs Frank Tousey, Publisher, a Corporation. No. 2060. Injunction Bond. Court of Appeals, District of Columbia. Filed Mar. 22 1910. Henry W. Hodges, Clerk.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Frank Tousey Publisher, a Corporation, as principal, and American Surety Company of New York, a corporation, of No. 100 Broadway, New York City N. Y., as surety, are held and firmly bound unto Frank H. Hitchcock, Postmaster General of the United States in the full and just sum of three hundred ($300) dollars, to be paid to the said Frank

H. Hitchcock, Postmaster General of the United States — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and successors jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of March, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Frank H. Hitchcock, Postmaster General of the United States, appellant, and Frank Tousey, Publisher, a Corporation, appellee, a decree was rendered against the said Frank Tousey, Publisher, a Corporation and the said Frank Tousey Publisher, a Corporation having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Frank H. Hitchcock, Postmaster General of the United States citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Frank Tousey Publisher a Corporation shall prosecute said appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK TOUSEY, *Publisher.* [SEAL.]
SINCLAIR TOUSEY, *President.* [SEAL.]
CHARLES E. NYLANDER, *Sec'y.* [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]
By HORACE P. HOLLISTER. [SEAL.]
Resident Vice President.

Attest:
MARSHALL L. BROWER,
Resident Assistant Secretary.

[Seal of American Surety Company.]

Sealed and delivered in presence of—
ANNIE A. WARFORD.
L. SENAREUS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

March 22, 1910.
Satisfactory.
F. SPRIGG PERRY,
Ass't U. S. Att'y.

[Endorsed:] No. 2060. Frank H Hitchcock, Postmaster General of the United States, Appellant, vs. Frank Tousey, Publisher, a Corporation. Bond for Costs on Appeals to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Mar. 22, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Frank H. Hitchcock, Postmaster General of the United Sta
Greeting:

You are hereby cited and admonished to be and appear at a
preme Court of the United States, at Washington, within 30 d
from the date hereof, pursuant to an order allowing an appeal, f
in the Clerk's Office of the Court of Appeals of the District of
lumbia, wherein Frank Tousey, Publisher, a Corporation, is ap
lant and you are appellee, to show cause, if any there be, why the
cree rendered against the appellant, should not be corrected, and w
speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Co
of Appeals of the District of Columbia, this 22d day of March,
the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia

Service accepted March 22, 1910.
DANIEL W. BAKER,
Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed M
22, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the Dist
of Columbia, do hereby certify that the foregoing printed and ty
written pages numbered from 1 to 39, inclusive, contain a true c
of the transcript of record and proceedings of said Court of App
in the case of Frank H. Hitchcock, Postmaster General of the Un
States, Appellant, vs. Frank Tousey, Publisher, a Corporation,
2060, January Term, 1910, as the same remain upon the files
records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix
seal of said Court of Appeals, at the City of Washington, this 2
day of March A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the
District of Columbia

In the Supreme Court of the United States, October Term, 191

No. 251.

FRANK TOUSEY, Publisher, a Corporation, Appellant,
vs.
FRANK H. HITCHCOCK, Postmaster General.

The appellant, by its counsel and solicitors says: That the C
of Appeals of the District of Columbia, in its decree of March 1, 19

reversing the decree of the Supreme Court of the District of Columbia of June 11, 1909, erred in the following particulars, which appellant respectfully assigns as errors:

1. Said Court of Appeals erred in dismissing appellant's Bill of Complaint, and in dissolving the injunction granted by the Supreme Court of the District of Columbia by its final decree of June 11, 1909.

2. Said Court of Appeals erred in holding that, before annulling, by the order of July 26, 1907, (Rec. p. 10), the certificate of entry of appellant's publication as second class mail matter previously granted on December 8, 1898, the Postmaster General accorded appellant a hearing in compliance with the requirement of the Act of March 3, 1901, Ch. 851 (31 Stats. L. 1107).

3. Said Court erred in holding that the citation dated May 17, 1907, constituted due notice of the specific charges upon which the Post Office Department intended to proceed at the hearing designated in said citation.

4. Said Court erred in reversing the holding of the Court below that the order revoking appellant's certificate of entry was issued without a hearing, such as is provided for by law.

5. Said Court erred in holding that the proceedings had at the Office of the Superintendent of Classification in the Post Office Department on June 11, 1907, constituted a hearing, as required by the Act of March 3, 1901, Ch. 851.

6. Said Court erred in holding that the Postmaster General, in annulling appellant's certificate of entry and in excluding their publication from the second class of mail matter without any other hearing than the proceedings of June 11, 1897, did not deprive appellants of the right of property without due process of law.

7. Said Court erred in holding that the successive numbers of "Work and Win" do not constitute a periodical publication within the meaning of the Act of March 3, 1897, Ch. 180 (20 Stats. L. 358).

8. Said Court erred in holding that the successive numbers of "Work and Win" do not constitute a periodical publication within the ordinary meaning of the term.

9. Said Court erred in refusing to hold that the settled and uniform construction of the terms, "periodical" and "periodical publication," as used in the prior postal acts of June 28, 1872, Ch. 335, and in Sections 3884-3886, 3905, 3906, 3908, was not adopted and written into the Acts of March 3, 1879, Ch. 180, by the continued use of said terms.

10. Said Court erred in refusing to hold that the rejection of the proposed amendment altering the provisions embraced within the Act of March 3, 1879, in the sense in which said provisions are now sought to be construed by administrative action, is not conclusive as to the meaning intended to be placed by Congress upon said provisions.

11. Said Court erred in holding that, in order to be entitled to be second class entry as a periodical publication under the Act of March 3, 1879, Ch. 180, every number of a publication must, as matter of law, consist of a variety of original articles by different authors and be incomplete in itself.

12. Said Court erred in refusing to hold that the regular, habitual, and uncontested admission of publications, substantially similar to appellant's publication which was excluded, constituted a denial of the equal protection of the laws, and an arbitrary, unjust and capricious discrimination against appellant's publication without warrant of law and beyond the scope of the authority of the Postmaster General.

13. Said Court erred in holding that each of the numbers of appellant's publication is a complete piece of fiction not connected with, or dependent upon, any other number, and that the numbers of said publication have no literary continuity.

14. That said Court erred in holding that, internally and in substance, each number of appellant's publication is a book.

J. J. DARLINGTON,
H. H. GLASSIE,
Solicitors for Appellants.

[Endorsed:] 22,098. October Term, 1911. No. 251. Frank Tousey, Publisher, a Corporation, Appellant, vs. Frank H. Hitchcock, Postmaster General. Assignment of Errors. J. J. Darlington, Henry H. Glassie, Solicitors for Appellants.

[Endorsed:] File No. 22,098. Supreme Court U. S. October Term, 1911. Term No. 251. Frank Tousey, Publisher, a corporation, Appellant, vs. Frank H. Hitchcock, Postmaster General. Assignment of Errors. Filed January 2, 1912.

Endorsed on cover: File No. 22,098. District of Columbia Court of Appeals. Term No. 251. Frand Tousey, publisher, a corporation, appellant, vs. Frank H. Hitchcock, Postmaster General of the United States. Filed April 11th, 1910. File No. 22,098.

Supreme Court of the United States

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
MAR 12 1912
JAMES H. McKENNEY,
Clerk.

No. 31.

ORMOND G. SMITH, *et al.*,

v.

FRANK H. HITCHCOCK, *Postmaster-General.*

No. 32.

FRANK TOUSEY, *Publisher, a Corporation,*

v.

FRANK H. HITCHCOCK, *Postmaster-General.*

BRIEF FOR APPELLANTS.

J. J. DARLINGTON,
H. H. GLASSIE,
Attorneys for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

preme Court of the United States

OCTOBER TERM, 1911.

No. 250.

ORMOND G. SMITH, *et al.*,

v.

FRANK H. HITCHCOCK, *Postmaster-General.*

No. 251.

FRANK TOUSEY, *Publisher, a Corporation,*

v.

FRANK H. HITCHCOCK, *Postmaster-General.*

BRIEF FOR APPELLANTS.

Statement

These are companion causes, upon practically the
ne facts, and are to be heard together, the record
ving been made up principally from cause No. 250,

with a stipulation (Rec., 120) that the testimony taken therein should be used in the other cause. Cause No. 250, therefore, may be treated in this brief as if it stood alone, to be followed later by the consideration of such points of difference, if any, as exist betwen that case and No. 251.

The appellants, Smith, Smith and Gould, are co-partners in the publishing business under the firm name of Street & Smith, which firm has been engaged in that business for the past fifty-five years, during the greater part of which time they have been publishing periodicals similar to the Tip-Top Weekly, the publication involved in this suit. Its publication began in 1897, on the first day of March, in which year it was admitted to second class rates of postage, in accordance with the following certificate: (Rec., p. 9.)

"(3505.)

"Certificate of Entry of Publication as Second-Class Matter.

Post Office at New York, N. Y., M'ch 1, 1897.

I hereby certify that the Tip-Top Weekly, a weekly published at this place, has been determined by the Third Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. W. DAYTON,
Postmaster.
Per E. S. Post."

POOR COPY

The publication was regularly continued and transmitted through the mails as second-class matter without question until the year 1907, when it was excluded by an order of G. L. Lawshe, Third Assistant Postmaster-General (Rec., pp. 10-11) as follows:

"C. D.
111462 113162 O. N. 31271
113161 113163

Post Office Department,
Third Assistant Postmaster-General,
Division of Classification,
Washington, July 26, 1907.

Postmaster, New York, N. Y.

Sir: In connection with the rule to show cause, you are informed that a hearing was given to the publishers of the 'New Nick Carter Weekly,' 'Buffalo Bill Stories,' the 'Tip-Top Weekly,' and 'Diamond Dick, Jr.,' at this office on June 11, 1907.

The arguments of counsel for the publishers were considered and submitted to the Assistant Attorney-General for the Post Office Department, who held that the publications in question were not 'periodical publications' within the meaning of the law, but 'books,' and therefore not entitled to transmission at the second class rates of postage.

In this opinion I concur and accordingly decide that the issues of the 'New Nick Carter Weekly,' 'Buffalo Bill Stories,' the 'Tip-Top Weekly,' and 'Diamond Dick, Jr.,' do not constitute newspapers or other periodical publications as required by sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879 (Ch. 180, 1 Supp., R. S., page 246), governing 'mailable

matter of the second class,' but are in fact books, which, under section 17 of said act, are third class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Therefore, the authority granted for acceptance of the 'New Nick Carter Weekly,' 'Buffalo Bill Stories,' the 'Tip-Top Weekly,' and "Diamond Dick, Jr.,' for mailing at the second class rates of postage is hereby revoked, and you are directed to enter that fact upon the records of your post office.

You will require postage at the third class rate—one cent for each two ounces or fraction thereof—to be prepaid by stamps affixed upon each separately addressed copy or package of unaddressed copies of the publication hereafter mailed at your office.

A copy of the opinion of the Assistant Attorney-General for the Post Office Department referred to is herewith enclosed to be handed to the publishers for their information.

Respectfully,
(Signed) A. L. LAWSHE,
Third Assistant Postmaster."

The bill was filed by the appellants to enjoin the enforcement of this order, upon the grounds, first, that it was made without the hearing required by the Act of Congress of March 3, 1901, and, secondly, that it is invalid upon its merits. The Supreme Court of the District of Columbia sustained the right to the injunction upon the first of these grounds, thus rendering it unnecessary to consider the second (Rec., p. 181). From that ruling the Postmaster-General

appealed to the Court of Appeals, which held both that appellants had been granted a hearing and that the issues of appellants' publications do not, as matter of law, constitute a periodical within the meaning of the Act of March 3, 1879 (20 Stats., 355, 358). (Rec., p. 186.)

The court accordingly reversed the decree of the Supreme Court, dismissed the bill of complaint and dissolved the injunction (Rec., p. 194). It is from that decree that this appeal is taken.

Assignments of Error

Appellants assign the following errors:

1. Said Court of Appeals erred in reversing the decree entered by the Supreme Court of the District of Columbia on June 11, 1909 (Rec., p. 181), and in dismissing appellants' bill of complaint, and in dissolving the injunction granted by its said final decree of June 11, 1909.

2. Said Court of Appeals erred in holding that, before annulling, by the order of July 26, 1907, the certificate of entry of appellants' publication as second class mail matter previously granted on March 1, 1897, the Postmaster-General accorded appellants a hearing in compliance with the requirement of the Act of March 3, 1901, Ch. 851 (31 Stats. L., 1107).

3. Said court erred in holding that the citation dated May 17, 1907, constituted due notice of the specific charges upon which the Post Office Department intended to proceed at the hearing fixed in said citation, for June 11, 1907.

4. Said court erred in reversing the holding of the court below that the order revoking appellants' certificate of entry was issued without a hearing, such as is provided for by law.

5. Said court erred in holding that the proceedings had at the office of the Superintendent of Classification in the Post Office Department on June 11, 1907, constituted a hearing, as required by the Act of March 3, 1901, Ch. 851.

6. That said court erred in holding that the Postmaster-General, in annulling appellants' certificate of entry and in excluding their publication from the second class of mail matter without any other hearing than the proceedings of June 11, 1897, did not deprive appellants of a right of property without due process of law.

7. That said court erred in holding that the successive numbers of the Tip-Top Weekly do not constitute a periodical publication within the meaning of the Act of March 3, 1879, Ch. 180 (20 Stats., 1. 358).

8. That said court erred in holding that the successive numbers of the Tip-Top Weekly do not constitute a periodical publication within the ordinary meaning of the term.

9. That said court erred in refusing to hold that the settled and uniform construction of the terms, "periodical" and "periodical publications," as used in the prior postal acts of June 28, 1872, Ch. 335, and in sections 3884-3886, 3905, 3906, 3908, was adopted and written into the Act of March 3, 1879, Ch. 180, by the continued use of said terms.

10. Said court erred in refusing to hold that the rejection of the proposed amendment altering the provisions embraced within the Act of March 3, 1879, in the sense in which said provisions are now sought to be construed by administrative action, is not conclusive as to the meaning intended to be placed by Congress upon said provisions.

11. That said court erred in holding that, in order to be entitled to be second class entry as a periodical publication under the Act of March 3, 1879, Ch. 180, every number of application must, as matter of law, consist of a variety of original articles by different authors and be incomplete in itself.

12. That said court erred in refusing to hold that the regular, habitual, and uncontested admission of publications, substantially similar to appellants' publication which was excluded, constituted a denial of the equal protection of the laws, and an arbitrary, unjust and capricious discrimination against appellants' publication without warrant of law and beyond the scope of the authority of the Postmaster-General.

13. That said court erred in holding that each of the numbers of appellants' publication is a complete piece of fiction not connected with, or dependent upon, any other number, and that the numbers of said publication have no literary continuity.

14. That said court erred in holding that, internally and in substance, each number of appellants' publication is a book.

Argument

It will be seen, therefore, that there are two principal questions before this court, namely:

I. Was the order of July 27, 1907, made after hearing as required by the statute?

II. Was the order valid upon the merits of the case?

Part One: The Hearing

As above stated, appellants' publication, the Tip-Top Weekly, was adjudged and admitted to the mails at the second class or pound rates of postage on March 1, 1897, and continued thereafter to be so transmitted by the postal authorities, without question, until the month of May, 1907, when the following citation was addressed to it by A. L. Lawshe, the then Third Assistant Postmaster-General (Rec., pp. 9-10):

> "Post Office Department,
> Third Assistant Postmaster-General,
> Division of Classification,
> Washington, May 17, 1907.
>
> Publishers of the Tip-Top Weekly, New York, N. Y.
>
> Sirs: You are hereby notified that, in accordance with the Act of Congress approved March 3, 1901 (Ch., 851, Stats. at L., 1107), you will be granted a hearing at the office of the Third Assistant Postmaster-General, Washington, D. C., at 2 P. M., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip-Top Weekly to the second class of mail matter under the Act of March 3, 1879, should not be revoked, and why the third class rate of postage

should not be charged for the admission of that publication in the mails, upon the following ground:

That the issues of the Tip-Top Weekly do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879 (Ch., 180, 1 Supp., R. S., p. 246), governing 'Mailable matter of the second class,' but are in fact books, which under Section 17 of said Act are third class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Your answer, in writing, must be submitted on or before June 11, 1907.

Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

A. L. LAWSHE."

Not accepting the suggestion of Mr. Lawshe to "avoid the expense and trouble of a trip to Washington" by submitting its case upon written answer, the appellees sent to Washington as their representative at the proposed hearing, Mr. W. H. Heines, an employee of their firm, thoroughly acquainted with the facts and circumstances of its publication. Mr. Heines appeared at the office of the Third Assistant Postmaster on June 10, 1909, bringing with him a printed response to the citation, which he left at the office of the Third Assistant Postmaster-General in order to give that official an opportunity to read it

in advance of the hearing fixed for the following day (Rec., p. 47). In the printed answer, sometimes referred to in the record as the brief, the appellees declared the Tip-Top Weekly to be a "general periodical publication in all essential particulars, and wholly and completely within the contemplation of the statute," upon certain grounds set forth in it, and concluded as follows: "The foregoing discussion will, we submit, satisfy you beyond all question that the issues of the Tip-Top Weekly constitute a periodical publication and that they are not in any sense books; *but, if you are not satisfied, we beg a further opportunity to present argument, for there is much more that may be urged in support of our contention.*"

On the following day, June 11th, at the appointed hour of 2 o'clock, Mr. Heines appeared at the office of the Third Assistant Postmaster-General, informed the office messenger of his appointment with the Third Assistant Postmaster-General, was ushered into a side room where, in response to his request to see the Third Assistant Postmaster-General, he was told by his clerk, a Mr. Due, "The party you want to see is downstairs." The messenger thereupon conducted him to an office on the lower floor of the building, on the door of which was the inscription, "Superintendent Classification Department," where he was introduced to a Mr. Bacon. What followed is shown by the testimony of Mr. Heines (Rec., pp. 48-50), and is undisputed:

"Q. What occurred between you and Mr. Bacon?

A. We looked at one another, and I asked him if he received the document I left the day before and he said he had.

Q. Did you tell him who you were?

A. I asked him if he received my card, and I asked him if he had anything to say to me and he said no.

Q. Did you tell him your business?

A. I told him I was down there to answer any questions they might ask me.

Q. What did Mr. Bacon say?

A. Says 'I haven't anything to ask.' I asked him if he had read it and he said 'Yes.' I said 'Have you anything to ask me,' and he said 'No.' I said 'I have been sent down to see you,' and he says—and I asked him if it was not customary for him to go over that and he says, 'Well, when they hand me a document like that, they tell me what to say, but I haven't been informed this time what to say, and I haven't anything to say to you.'

Q. What further conversation, if any, took place between you and Mr. Bacon?

A. I told him I would go back again to the Third Assistant Postmaster-General, and I went back and asked the same gentleman, the clerk, if I could see the Third Assistant Postmaster-General and told him I was down for that purpose, and he said he was engaged. I told him I would wait, and he says, 'It may take a long time,' and I said, 'I will wait at the hotel.' I was put into my coat again and I went down stairs to see Mr. Bacon. I returned to Mr. Bacon and told him I had been upstairs and was unable to see the Third Assistant Postmas-

ter-General, and requested to him to put me on record as having called and he said he would do so.

Q. What message, if any, did you leave with the clerk of the Third Assistant Postmaster-General with respect to your being subject to his call?

A. I told him I was in Washington at the New Willard Hotel, and would await any telephone message he would send, and would call at any time.

Q. During these interviews in the office of the Third Assistant Postmaster-General, and the office of the Superintendent of Classification, was any statement made to you of any charge or accusation against the Tip-Top Weekly?

A. No, sir.

Q. What, if any, statement was made at either of those places by any official with respect to grounds upon which the exclusion of that periodical might be urged?

A. The question was not taken up at all.

(Mr. McNamara: I object to that on the ground that the notice or the citation states those facts, and I object on the ground that it it is immaterial as the grounds are specified in the citation.)

Q. I show you a copy, which has to be taken as the original, of the rule to show cause, May 17th, drawing your attention to this statement: 'Upon the following grounds: That the issues of the Tip-Top Weekly do not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879, Chapter 180, first

suppts., p. 246, governing mailable matter of the second class, but are in fact books which, under Section 17 of said act, are third class matter and chargeable, when sent in the mails, at the rate fixed by law for that class of mail matter.' Now, Mr. Heines, with the exception of the ground stated in these words in the rule to show cause, itself, what, if any, specifications or grounds or reasons or matters of evidence were brought to your attention at the time of this supposed hearing, by any official of the Post Office Department?

A. None.

(Mr. McNamara: I object to the question on the same ground.)

Q. Did you, at the time mentioned, or at any subsequent time, see the Third Assistant Postmaster-General?

A. No, sir.

Q. What, if anything, other than that which you have already testified to, was said to you by the Superintendent of Classification with respect to the reasons, grounds, or evidence upon which the Post Office Department would rely, to show that the Tip-Top Weekly was not a newspaper or other periodical as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879?

(Mr. McNamara: I object to the question as calling for the witness's view as to the ground on which the Post Office authorities would rely for their own decision for the exclusion of matter as second class mail.)

A. The subject was not taken up at all; nothing was said about it.

(Mr. McNamara: I want to add to my objection the further ground that the question implies the necessity of some statement on the part of the individual whom Mr. Heines saw, as a justification on the part of the Post Office authorities for the issuance of this order excluding the Tip-Top Weekly from the second class mail. The record does not show that Mr. Heines submitted a printed brief in response to the citation.)

Q. What response, or message, did you receive from the Third Assistant Postmaster-General, or any person in the Post Office Department, in reply to your message left with the clerk that you would respond to any message?

A. 'All right,' or something to that effect.

Q. That was when?

A. When I was making my last departure; I had been there twice.

Q. After that, what message did you receive in response to that?

A. Did not receive any.

Q. What reasons, grounds, or matter of evidence were stated to you by the Third Assistant Postmaster-General, or the Superintendent of Classification, or any officer of the Post Office Department, in support of the allegation contained in the rule to show cause as follows: 'But are in fact books, which, under Section 17 of said act, are third class matter and chargeable when sent in the mails at the rates fixed by law for that class of mail matter'?

A. None.

(Mr. McNamara: We object to the question on the ground that it is immaterial.)

Q. What matter of fact, of any sort or description, would you say was brought to your attention at either of those interviews?

A. None.

Q. When did you return to New York, Mr. Heines?

A. That night; June 11th.

Q. What train did you take?

A. Late afternoon train. I do not recall the hour now.

Q. What communications, if any, did your firm receive from the Post Office Department until the notification of the exclusion which is an issue in this case?

A. There was not any communication."

The next step in the matter of which the appellees had any notice, was the letter of E. M. Morgan, Acting Postmaster, of April 29, 1907, enclosing the order of exclusion, issued by the Third Assistant Postmaster-General (Rec., pp. 50-52).

Mr. Bacon, called as a witness for the appellee, testified that Mr. Heines "was given an opportunity to make any statement he cared to make, and did not seem disposed to make any statement of the matter other than to present this little pamphlet, 'The Influence of the Dime Novel,' and the briefs which he filed" (Rec., p. 164). Upon his cross-examination he testified (Rec., pp. 165-7), as follows:

"You testified, I think, more than once, that he expressed no desire for any opportunity to be

heard. I am asking you if that is simply your way of putting the fact that what he said was he would like to have you consider that pamphlet?

A. Yes, sir; that is what he said to me.

Q. And the rest was simply your inference of the fact from what he said?

A. Yes, sir.

Q. Did Mr. Heines indicate any indisposition to discuss the case with you?

A. He indicated no disposition to discuss it.

Q. Now let me repeat it. Did he indicate any indisposition?

A. He did not say he would not discuss it.

Q. Did he in any manner indicate any indisposition to discuss it with you?

A. Except that he did not make any effort to discuss it.

Q. Your language is a habit. Mr. Bacon, did Mr. Heines show any indisposition to make a statement on the subject?

A. He did not make any statement.

Q. That is the fact, and the balance is your way of putting it?

A. Yes, sir.

Q. Did you ask him any questions?

A. No, sir.

Q. Did you call his attention to the fact that the continuity of the subject-matter of his publication was under consideration?

A. I did not discuss the case with him other than as stated.

Q. You gave him no specific information as to what the objection was?

A. I did not discuss the case with him.

Q. Can not you answer my question more directly?

A. I have answered your question.

Q. You have no feeling about the cause, have you?

A. Absolutely none.

Q. Why then can't you state whether or not you directed his attention to any of the objections that your Department was entertaining to his publication?

A. I did not discuss the case with him.

Q. Why not?

A. He showed no desire for it and I did not attempt to discuss it with him.

Q. You stated that you were charged with the duty in connection with your chief of rendering a decision which would vitally affect the interests of the complainants, did you not?

A. I was not charged with the duty of rendering a decision.

Q. Or aiding in its consideration?

A. It was my duty to aid in considering the case.

Q. And you did not think it incumbent upon you or upon the Department to let these people know what your objections were to their publications?

(Mr. McNamara: I object to that, because it has not been stated that he had any objections. I do not want counsel to be unconsciously unfair to a witness.)

(Mr. Darlington: We will give him the benefit of that suggestion.)

Q. What part did you take in the consideration of the cases?

A. Carefully going over the papers prior to sending them up to Mr. Lawshe. When they

were before him I also discussed the case with him.

Q. What had you done in the matter, if anything, prior to your interview with Mr. Heines?

A. The routine matters in regard to preparing the case for citation had been under my charge.

Q. In the course of that preparation of these preliminary matters did you familiarize yourself, or were you yourself familiar, with the objections to the continuance of second class rates to these publications?

A. I was, because the citation had been prepared in my division and under my direction.

Q. You knew at the time of the interview with Mr. Heines what objections the Department was considering against continuing these second class rates?

A. Yes, sir.

Q. And you knew that Mr. Heines had come down from New York for the purpose of representing the complainants before you and did not call his attention to any of these objections?

A. The citation of the Third Postmaster-General—

Q. When he came down personally and appeared personally before you in this connection, you did not call his attention to the particular points of objection you had?

A. There was no necessity.

Q. I am not asking you as to necessity. I am asking you what occurred?

A. I did not, no, sir.

Q. That is all."

At page 124 of the record Mr. Bacon testifies that the "hearing" referred to in the order of exclusion

took place, not before the Third Assistant Postmaster-General, but before himself; that the decision excluding the publications of the appellees was made, not by him, but by somebody else; that, according to the practice of his office, the burden of proof upon the question whether a second class mail privilege once given to a publisher should be sustained or annulled is conceived to rest upon the publisher; that (Rec., p. 126) it may be Heines asked him, as claimed by him, whether he, Bacon, had any questions to ask about the subject-matter of the hearing, and that he, Bacon, replied that he had not; that he stated no ground, reason or matter of any sort in support of the charge or allegation contained in the citation—"There were no facts presented to Mr. Heines. It was incumbent upon Mr. Heines to present facts to the Department."

Mr. Heines, it will be observed, was never admitted to the presence of the Third Assistant Postmaster-General at all, nor, from June 11, 1907, until notification of the order of exclusion, were any communications received by the appellees from the Post Office Department. Nevertheless, as appears upon the face of the order of exclusion, the matter was referred by the Third Assistant Postmaster-General, after the ineffectual attempt of Mr. Heines to see him, to an official of the Post Office Department appointed by the Postmaster-General (Rec., p. 160), who bears the designation of Assistant Attorney-General for the Post Office Department, and who, according to the order of exclusion, "held that the publications in question were not 'periodical publications' within

the meaning of the law, but 'books,' and therefore not entitled to transmission at the second class rates of postage." "In this opinion," recites the Third Assistant Postmaster-General in the Order of Exclusion, "I concur, and accordingly decide," that the several publications embraced in the decision of the Assistant Attorney-General for the Post Office Department, one of which was the Tip-Top Weekly, do not constitute periodical publications or mailable matter of the second class.

Mr. Lawshe testifies that the reference to the Assistant Attorney-General for the Post Office Department was "after having issued the citation and having granted the hearing at which the publisher filed certain briefs," that the "legal judgment" of that officer was rendered on July 11, 1897, and that, when the reference to him was made, the time for hearing had passed (Rec., pp. 159-60). A number of the publications of the appellants of similar character were embraced and collectively referred to the Assistant Attorney-General for the Post Office Department (Rec., p. 161), and disposed of together by him. His manner of considering and dealing with the question is illustrated at page 160 of the Record:

> "From an advertisement before me, it seems to have been the purpose of the Magnet Detective Library [a publication not embraced in the citation] to furnish to the world the writings of one 'Nicholas Carter,' and a personal examination of several of the numbers of that library shows that their contents consisted mainly of accounts of the exploits of 'Nick Carter,' the au-

thor and hero presumably being one and the same person. The same object is now attained throughout the medium of the publication called 'The New Nick Carter Weekly' [one of the publications under consideration]. In order to give the Magnet Detective Library a touch of respectability, the works of certain other authors were introduced. But an examination of the advertisements referred to shows that thirty-three out of a total of seventy-five books were the works of 'Nicholas Carter,' for the most part narrating his personal experiences. The advertisement is worded, 'Here is where you get your celebrated Nick Carter stories * * * 12 mo books, elegant covering.' Notwithstanding the fact that Messrs. Street & Smith filed a sworn bill in the Supreme Court of the District of Columbia alleging that the issues of the Magnet Detective Library were issues of periodicals, and not of books, they now, in flat contradiction of their statement under oath, allege that the issues of this Library's series 'were prepared, bound, treated and considered as books.'"

Asked (Rec., pp. 160-1) where the "advertisement" thus considered in the case was obtained, and how it came before either himself or the Assistant Attorney-General for the Post Office Department, the Third Assistant Postmaster-General answered, "I have no information as to the source of the advertisement refered to; but it is probably a part of the record in the case"—the whole record in the case of which the appellees had notice being the citation of May 17, 1907, and the brief prepared by them to accompany the oral hearing which they anticipated

would be accorded them. If afforded an opportunity to meet the injurious findings of fact by the Assistant Attorney-General of the Post Office Department, the appellants could have shown that, while their stories were originally published in periodical form, of which only a few back numbers were reserved to supply the demands of occasional dealers (Rec., pp. 39-40), some of the stories are afterwards collected and republished as 12mo volumes of about 320 pages, the page size being 3½ by 6 inches, while the periodical page is seven inches by ten, the periodical containing about 26,000 words, while the book contains over 60,000 words (Rec., p. 43), the books being bound volumes, while the periodicals are in printed paper sheets, not bound in board, cloth, leather or other substantial binding (Rec., p. 27).

The letter of the Postmaster of New York City of July 29th, informing the appellees of the order of July 26, 1907, was their first "information" that the Assistant Attorney-General for the Post Office Department had anything to do with the case, nor did they learn until long subsequently that the order of exclusion was passed upon the theory that the periodicals under consideration in 1907 were being disposed of under the claim of fact that they were in the same class with the Magnet Detective Library Books, or that the representations made on their behalf in the brief which they did succeed in getting to the postal authorities were discounted by the erroneous charge, of which they had no notice, and to which they had no opportunity to reply, that they had been guilty of perjury in their

bill in a former litigation in respect to the Magnet Detective Library publications.

Still further, as illustrating the nature of the "hearing" accorded the appellees in this matter, Mr. Lawshe testifies that "the initial origin" of the proceeding to exclude complainant's periodicals was a letter from one Cotterman, Director of Posts of the Philippine Islands (Rec., pp. 149-151-152), the accusation contained in which is obviously, and indeed by the phraseology of the letter itself, grounded upon rulings of the Department in pursuance of a regulation of July 17, 1901, which had been declared to be clearly in excess of the statute, and absolutely void. Payne v. Ry. Pub. Co., 20 App. D. C., 281-5-6, 598-9. Thereupon the citation of May 17th was prepared by Mr. Bacon, who admits (Rec., pp. 166-7) that, at the time of Mr. Heines' interview with him, he knew the objections the Department was considering against continuing the second class rates and that Heines had come down from New York for the purpose of representing appellants, but that he did not call his attention to the particular points of objection that he had in mind against the publication, because "there was no necessity"—and this although the citation, the only notice given to appellees, had stated no ground of objection except the general conclusion of law that the issues of the Tip-Top Weekly did not "constitute a newspaper or other periodical publication as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879," but were "in fact books." At page 126 of the Record, he testified, on cross-examination:

"Q. Do you remember Mr. Heines saying to you that he was down there to answer any questions that you might ask?

A. Not necessarily; no, sir.

Q. Is your memory very clear about that?

A. Not as to the details.

Q. Did you ask him any questions?

A. The question whether in addition to his written statement he had any verbal statements that he cared to make.

Q. Did you ask him about the publications?

A. I do not remember.

Q. Well, now, isn't it true Mr. Bacon that he asked you whether in respect of this hearing, you, as Superintendent of Classification, had any question to ask him about the subject-matter of the hearing, and that you replied, 'No,' that you had not?

A. I do not remember as to that. No, sir.

Q. You do not deny that that may be a substantially accurate statement?

A. It may be that is the fact.

Q. What ground, reason, or matter of any sort, did you state to Mr. Heines in support of any charge or allegation in the citation?

A. I made no statement to Mr. Heines."

And, on re-direct examination by counsel for the appellant, he testified (Rec., pp. 128-9), as follows:

"Q. Do you recall whether Mr. Heines asked you if you wanted to ask him any questions?

A. I do not recall that. I would not necessarily ask Mr. Heines any questions.

Q. Do you recall that he did not ask you?

A. I cannot say that he did not.

Q. Your memory is indefinite as to the thing itself?

A. As to the detail, yes.

Q. As to whether you wanted to ask him any questions or not?

A. Yes, sir."

As to the effect of this indefinite *non mi recordo*, in answer to the affirmative positive testimony of Mr. Heines, see Stitt v. Huidekoopers, 17 Wall., 384, 394.

The witness did not call the attention of Mr. Heines to the fact that continuity, or the alleged want of it, in the subject matter of his publication was one of the points of objection under consideration; he gave no specific information as to what the objection was—he showed no desire for it and did not attempt to discuss it with him (Record, p. 166); and this although, as he admits, he is unable to deny the statement of Mr. Heines that he asked Bacon whether he had any question to ask him about the subject-matter of the hearing, and although the brief filed with him the day before that fixed for the hearing, and which he testifies he had read prior to that day, concluded with the statement, "If you are not satisfied, we beg a further opportunity to present argument, for there is much more which may be urged in support of our contention." This brief was filed the day before that fixed for the hearing, in order that it might be read in advance of that day (Rec., p. 47).

This attitude, that the appellants were not entitled to know the objection under which it was proposed to exclude their publications from second class rates,

is further disclosed upon the cross-examination of the Third Assistant Postmaster-General himself, who, at page 153 of the Record, testifies as follows:

> "Q. Did you at any time advise the complainants of the characteristics of periodicals it is claimed its publication lacked?
>
> A. At no time have I attempted to act as the legal adviser of the publisher.
>
> Q. Do you consider that you would be acting as his legal adviser by giving specific notice of the characteristics of periodicals which they lacked, and which would properly constitute second class matter?
>
> (Mr. McNamara: Same objection.)
>
> A. It would seem that would be the case. I would not be required to give advice to the publisher under such circumstances.
>
> Q. Did you consider that giving the complainants specific notice of the charge brought against their publication, of the character of that charge, would have been advising them legally?
>
> (Mr. McNamara: Same objection. The question is speculative.)
>
> A. (After question repeated to witness.) It seems to me that that is putting the matter in rather a negative form, and I do not think that I would be required to advise the publisher as to what his publication lacked; but the citation asserted what the Department considered it actually was."

And again at pages 157-8:

> "Q. Did you at any time give the complainants notice that you regarded its publication as lacking in the necessary continuity of subject-matter of a newspaper or periodical?

(Mr. McNamara: Same objection.)

A. I refer to the citation.

Q. Why can't you answer these questions Mr. Lawshe without referring to the citation?

A. Because I think it is a sufficient answer.

Q. In so far as you know, did your Department through any of its officers give the complainants the information about which I am now asking?

(Mr. McNamara: That is objected to.)

(Mr. Lawshe here called for brief filed in the Tip-Top Weekly inquiry.) A. What is the particular information about which you are now asking?

Q. Whether the complainants were given notice that lack of variety of subject-matter, or lack of the continuity of the subject-matter, was being considered as the ground for excluding them from second class rates?

A. I think that all of that would be covered by the citation itself.

Q. And do I understand that you neither gave nor caused to be given any other notice than the citation?

(Mr. McNamara: That is stipulated and admitted on the record.)"

The utter disregard of the ordinary and accepted conception of a hearing with which the Department acted in this case, is further shown by the way the matter was dealt with between the various postal offi-

cials themselves, after they deemed the complainant's mouth closed by the ceremony of June 11th.

Bacon (Rec., p. 124):

> "Q. I draw your attention to this statement: 'In connection with the rule to show cause, you are informed that a hearing was given to the publishers of the Nick Carter Weekly, Buffalo Bill Stories, the Tip-Top Weekly and Diamond Dick, Jr., at his office on June 11, 1907.' Will you be good enough to state whether the hearing there referred to took place before you or before the Third Assistant Postmaster-General?
>
> A. Before me.
>
> Q. No other hearing except the one before you is referred to in this letter?
>
> A. No, sir.
>
> Q. Did you decide yourself upon your own responsibility as an officer of the Department?
>
> A. No, sir.
>
> Q. The decision, if any, which excluded the complainant's publications, was made by somebody else?
>
> A. Yes, sir."

In reply to questions of his own counsel, Mr. Bacon thus describes how, after the hearing before him, he passed the whole thing on to somebody else:

> "Q. You state that, after you hear the matter or consider the written brief, you make a report to the Third Assistant?
>
> A. I present the material facts to the Third Assistant and he considers the same.
>
> Q. Do you also discuss the matter with the Third Assistant?

A. Yes, sir.

Q. And in this case did you refer the matter and the report of the essential facts to, and discuss the case with, the Third Assistant?

A. I did, in detail.

Q. In detail?

A. Yes, sir."

Bacon (Rec., pp. 127-8.)

What these "material facts" were, however, appears a little clearer on cross-examination:

"Q. When you say that, after oral argument before you, you presented the essential and material facts to the Third Assistant Postmaster-General, you mean, of course, the facts which you regarded as essential and material?

A. I mean the facts which throw any light, in my opinion, upon the question at issue, which as a rule are incorporated as a part of a memorandum which I prepare in each case just the same as in this particular case a memorandum was prepared briefly setting out the facts that Mr. Heines had called and presented the briefs heretofore referred and the little pamphlet on the subject of the dime novel."

Bacon (Rec., p. 129.)

"Q. So, coming back to him, all that you know about it is that you submitted to him what you called a record, with such views of your own as you saw fit to communicate, and the matter then rested with him?

A. Yes, sir."

Bacon (Rec., p. 129.)

Now, in the defendant's answer, paragraph 15, it is stated that, in deciding whether these publications were periodicals, the Third Assistant Postmaster-General considered "not only copies of successive numbers of the publications by comparison with requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry."

Answer, Par. XV (Rec., p. 20).

If these "other evidence and facts material" were communicated to Mr. Lawshe, the Third Assistant Postmaster-General, by Mr. Bacon, they emphatically were not communicated to the appellants by the citations, nor by Mr. Bacon to Mr. Heines at the hearing on June 11. "There were no facts presented to Mr. Heines."

Bacon, p. 126.

What the other evidence and facts material were, at least in part, has already been shown by the extracts from the opinion of the Assistant Attorney-General for the Post Office Department, the Third Assistant Postmaster-General's concurrence in which is assigned in the order of exclusion as the ground of that order.

Paragraph XV of appellant's answer (Rec., p. 20) contains the following: "This defendant is further informed and so believing avers, that in deciding the question whether the publication of complainant's is a periodical within the meaning of the law, the Third Assistant Postmaster-General considered *not only copies of successive numbers of the publication*,

by comparison with the requirements of the Act of March 3, 1879, *but also all other evidence and facts material to such inquiry.*"

What "copies of successive numbers of the publication" did the Third Assistant Postmaster-General consider? How did they get before him? What opportunity was afforded to appellees to ascertain whether they were, in fact, copies, or successive numbers, of its publication, and what hearing was accorded it in respect to the alleged comparison of these copies with the Act of March 3, 1879?

Further, what were the "all other evidence and facts material to such inquiry" which the Third Assistant Postmaster-General considered? How were they brought into the case, and what notice of them, or opportunity to be heard in respect to them, was given to appellees?

These objections, and their force, were quite apparent to the learned counsel for the appellee when the testimony was being taken in this cause, and they were endeavored to be obviated by means of extremely leading questions, persisted in over objection (Rec., p. 128), by means of which the witness Bacon was caused to say that, *so far as his knowledge went*, the Third Assistant Postmaster-General did not go outside of the record in any way, or take into consideration any facts or evidence *except those in the original citation*, those contained in the answer filed by Mr. Heines, *and those presented by the copies of the publication themselves which were under consideration.*

On cross-examination (Rec., p. 129), this witness

does not profess to testify as to what operated upon the mind of the Third Assistant Postmaster-General in deciding these cases—"I do not think for Mr. Lawshe"—all he knows about it is that he submitted to the Third Assistant Postmaster-General what the witness Bacon called a record, with such views of his own as he saw fit to communicate, and the matter then rested with him. It is a significant fact that no attempt was made to prove by the testimony of the Third Assistant Postmaster-General, himself, that there was any inaccuracy or mistake in the allegation of the answer that he considered copies of alleged successive numbers of the appellee's publication, compared them with the regulations of the Act of March 3, 1879, and that he considered, also, "all other evidence and facts material to such inquiry."

With respect to the omission or refusal to give the appellants notice of the objections to their publication upon which it was to be ruled out of the second class mail privileges it had so long enjoyed, the record (pp. 154-7) shows that, even when the case is before the court for the purpose of determining whether there is just or legal occasion for such exclusion, the Third Assistant Postmaster-General not only still omits, but still refuses, to disclose, even to the court, the grounds of exclusion or of objection. In other words, the arbitrary right is claimed to exclude not only without previous notice or opportunity to meet the objections on which the order of exclusion is to be based, but without disclosure to the court, afterwards, of these objections, or opportunity

to the court to know or to pass upon their merits or sufficiency.

The appellants, in addition to the Tip-Top Weekly, published four other weekly juvenile papers similar to it, excluded by the same order (Rec., p. 28). The inventoried value of their business, exclusive of good will, is $1,800,000, including a building erected for their business at a cost of $600,000, about one-third of which building would become useless if these weekly periodicals are excluded from the second class mail privileges (Rec., p. 32). They use presses and machinery especially constructed for these publications, which cost $49,000, and which would be in large part of no value, if their publications are barred from the mails (Rec., pp. 32-3). The regular issue of the Tip-Top Weekly, one of their five publications, is 105,000 copies per week, yielding a revenue of $190,000 per year, which, at a profit of 10 per cent, would yield a net annual revenue from the Tip-Top Weekly, alone, of about $19,000. The effect of the exclusion of these publications from the second class mail privileges would be to destroy the profit in them, they being only profitable by reason of their large circulation (Rec., pp. 35-6).

If the publications of the appellants are entitled, under the law, to be continued in the enjoyment of the second class mail privileges accorded them in 1897 by the then Third Assistant Postmaster-General, upon the faith of which decision the appellees have invested these large sums and built up their valuable business, it is clear the withdrawal of this

privilege is the denial of a legal right (Payne v. Ry. Pub. Co., 20 App. D. C., p. 598), and the destruction of property interests of great value.

Recognizing the importance of these rights to publishers, and the inequity of their arbitrary withdrawal, Congress, by the Act of March 3, 1901, provided, in terms, that the privilege, once granted, should not be withdrawn by the postal authorities "until a hearing should have been granted to the parties interested." As noted above, the first question presented by this case, and upon which, alone, the Supreme Court of the District held that the appellees were entitled to the injunction prayed, is that there was not "a hearing," in the sense of the statute.

Upon this subject the court, in Lewis Publishing Co. v. Wyman, 152 Fed. Rep., 787, 792-3, referring to the authority of the Postmaster-General to withdraw the privilege in question, said:

> "The power thus vested in the Postmaster-General was great, and, not being reviewable by the courts except for fraud or mistake, that official had the power to practically destroy any magazine or newspaper by merely withdrawing the second class privilege from such magazine or periodical; for no such publication having an extended circulation outside of the place where it is published could exist for any length of time if required not only to pay the third class postage, but to prepare it for the mails as such matter. It was to remedy this mischief, no doubt, that the provision was added to the appropriation Act of March 3, 1901, making the appropriation for the Post Office Department for the

fiscal year ending June 30, 1902. If this was the intention of Congress, and it is impossible to conceive of any other, then something more was meant by 'a hearing' than mere notice to the publisher to show cause by a day certain why the privilege theretofore accorded him should not be revoked. It may be conceded that Congress did not intend to confer upon the head of an executive department judicial powers, nor that there should be a hearing according to the strict rules governing courts, and it may be also conceded that this is a mere privilege and not a right which has become vested by the original permit; still, in order to make it a hearing, as I construe the meaning of this act, the publisher should not only be cited to show cause, but, after appearing, in response to the citation, ready to show cause, be given the opportunity of presenting his evidence, and also be informed what he is called upon to answer."

In Weybridge v. Addison, 67 Vt., 569, 575, a statute provided that, where the highway commissioners should be of opinion that a town would be excessively burdened by defraying all the expenses of making or repairing a given highway or bridge, they should give notice "of the time and place for a hearing in the premises." Construing this statute the court said:

"The phrase 'a hearing in the premises' embraces all the questions which are to be considered and passed upon by the commissioners. It covers the whole, and not a part of the questions

> involved. After such notice is given, the whole matter is open for hearing and final determination; and the towns deemed to be benefited *are entitled to be heard on every material question.*"

This would be but a barren right if the tribunal which is to hear and determine may lock up, in its own breast, the questions which it has determined to be material, and the parties thus entitled to be heard are left, without notice, to ascertain, by intuition, what are the questions which are considered and will be held to be material to the inquiry.

As was said by the late Mr. Justice Bradley, of the District Supreme Court, in his opinion in National Railway Publishing Co. v. Payne, affirmed by the Court of Appeals in 20 D. C. App., 581, and accepted by the Government as the law (192 U. S., 602):

> "It being admitted that this publication had been determined by successive Postmasters-General from 1870 down to the action of the Postmaster-General in November, 1901, to be entitled, under the statute, to transportation as mailable matter of the second class; it being admitted that the action of the Postmaster-General in annulling the certificate and refusing admission and transportation to this periodical was not based on any fraud in obtaining the admission of the periodical to transportation as mailable second class matter, or any change in the characteristics of the publication, it would appear to be incumbent upon the respondent *to specifically state* in what particular that publication fails to comply with the statutory re-

quirements. So failing, and in view of the letters written by the Third Assistant Postmaster-General and by the Postmaster-General to the relator, *giving reasons for the exclusion, the court must assume that the reasons so stated specifically are the sole reasons which form the basis of this action.*

In a case of this nature, and especially one where a *status* has been created by executive action, which constituted, so long as it existed, a valuable property right to the relator, it would appear to be incumbent upon the respondent to *aver with decision and particularity* the reasons controlling him in his action; and, in the absence of such statement, the court has the right to assume that no other reason than the one given exists." U. S. *ex rel.* Natl. Ry. Publishing Co. v. Payne, 30 Wash. Law Rep., 341.

In the case at bar, the appellee or his representatives thought it neither strange nor unusual that an officer, in making decisions upon the rights of people who had never been before him, could use, as a means of reaching his conclusions and as a ground of his judgment, allegations which they were never called upon to answer or permitted to explain or to hear. Lawshe (Rec., p. 162).

The language of the Act of March 3, 1901 (Chap. 31, Stats. L., 1107), is as follows:

> "When any publication has been accorded second class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

Conceding that the "hearing" in this and similar statutes need not be attended with all the formalities or incidents of a court trial, there are, nevertheless, certain inherent, fundamental essentials which have been clearly and conveniently laid down, as follows:

First. Specific charges.

Second. Due notice of such charges.

Third. An opportunity to make specific answers to them.

Fourth. An opportunity to cross-examine the witnesses in support of them, or, where there are no living witnesses, an opportunity to examine and to test the evidence adduced in their support.

Fifth. An opportunity to introduce evidence in contradiction of them.

Sixth. An opportunity for argument upon the testimony, the facts and the law, and,

Seventh. That all this should be before the proper tribunal, competent to render judgment, and which does in fact render judgment. United States *ex rel.* Wedderburn v. Blis 12 App. D. C., 485-93; Garfield v. United States, *ex rel.* Spalding, 32 App. D. C., 154-8.

No one of these elements can be omitted without destruction of the whole. Opportunity to make argument is without avail unless it be known to what that argument is to be addressed. Opportunity to adduce testimony is vain and valueless unless it be known against what that testimony should be directed. Opportunity to make answer is empty unless it is known what charges are to be answered, and notice, however elaborate and formal, is farcical un-

POOR COPY

less it be of specific charges, definitely and affirmatively apprising the accused of the charges which he is to meet. The omission of any of these elements, thus interlinked with each other, breaks down the whole.

It would be difficult, we submit, to present a case in which these indispensable elements of due process could have been more completely ignored than was done in the case at bar.

Of the seven enumerated elements, but one, namely, the service of formal notice, is present; and, as to this, the minute particularity of the date, place and hour of the hearing given in the citation serves only to bring into sharper relief the utter generality, vagueness and unreality of its substance.

Cited before an officer who did not hear; heard in silence by an officer who did not judge, judged in secret by still another officer whose connection with the matter was wholly undisclosed to them, these complainants are to be deprived of property worth hundreds of thousands, upon grounds never brought to their notice except by the fiat of exclusion issued in pursuance of it.

Permit us to summarize, briefly, the several stages of the proceeding now under review, in the light of the established principles stated:

1. The "specific charges" were, simply, "that the issues of the Tip-Top Weekly did not constitute a newspaper or other periodical publication as required by Sections 7, 10, 12 and 14 of the Act of Congress of March 3, 1879 (Ch. 180, 1 Supp. R. S., p. 246), regarding 'mailable matter of the second

class,' but are in fact books." What is this but a general charge that the publications fail to comply, generally, with the postal laws governing admission to the second class? Adjudicated ten years before to be entitled to the privileges of that class, hundreds of thousands of dollars invested in the enterprise upon the faith of that adjudication, no particular in which they had ceased to be periodical publications, nor any lacking element or characteristic of such publications, is so much as suggested. And, what makes the matter worse, is, at the very moment when this barren generality of a citation was issued against these publications, the Department had already determined what were the objections to the continuance to them of the second class rates (Rec., p. 166). The complainants were not advised of the characteristics of periodicals which it was claimed their publication lacked, because to have given this information, or notice, would have been "to act as the legal adviser of the publisher" (Rec., p. 153).

2. The "notice" as above pointed out, though minutely particular as to time and place, withheld, intentionally it would seem, the necessary information as to the objections to be met.

3. In the absence of notice of the objections to be answered, "opportunity for specific answer" necessarily failed. Could the right to an opportunity to answer charges that continuity of subject-matter and variety of authorship, for example, were essential characteristics of periodicals, and that either, or both, were lacking in Tip-Top Weekly, be made to

depend upon the ability of the publishers, without notice or suggestion of such objections, to arrive at them by conjecture, and they then be required to rest their defense and answer to the objections, thus imagined, at their peril? What they did do, under the pressure of the citation, was to set down such things as occurred to them as showing that their publications were periodicals, submit their answer in advance of the date fixed for the hearing, and conclude it with the statement that, if the officials were not satisfied, "we beg a further opportunity to present argument, for there is much more that may be urged in support of our contention," followed by appearance, by their representative, on the day fixed for the hearing, and vain efforts on his part either to see the Third Assistant Postmaster-General, or to obtain from Mr. Bacon some questions or information enabling them to make the further argument, which by their answer they begged the opportunity to present.

On this, the day noted by the appellant for the hearing, Mr. Heines called at 2 o'clock, the hour named, and informed the messenger that he "had an appointment with the Third Assistant Postmaster-General." Being informed by the clerk in charge "the party you want to see is downstairs," the messenger then conducted him to Mr. Bacon, who said he had received and read the brief, but had nothing to say to Mr. Heines, and, upon being asked if it was not customary for them to go over the matter, added, "When they hand me a document like that, they tell me what to say.

but I have not been informed this time what to say, and I haven't anything to say to you." Informing Mr. Bacon that he would then go back to the Third Assistant Postmaster-General, he did so, and was told that that official was engaged. Answering that he would wait, he was told "It may take a long time," when he replied that he would await a telephone message at his hotel, but before repairing to his hotel, went a second time to Mr. Bacon, told him he had been unable to see the Third Assistant Postmaster-General, and requested him to put him on record as having called.

The suggestion made in appellee's brief below, that this final effort of Mr. Heines to see the Third Assistant Postmaster-General was "purely a social one," scarcely rises to the merits or gravity of the situation.

4. That no "opportunity to examine or test the evidence in support of the charges" or objections under which the order of exclusion is based was afforded, need not be further argued. No notice whatever was given the complainants of the evidence collated, considered and discussed in the opinion of the Assistant Attorney-General for the Post Office Department, concurred in by the Third Assistant Postmaster-General, and made the basis of that order. The very existence of that evidence was not known to them until disclosed by the examination of witnesses in this cause. Neither the complainants, their counsel nor the court know now what constituted the "all other evidence and facts material to such

POOR COPY

inquiry" which were considered by the Third Assistant Postmaster-General, as set forth in Paragraph XV of the answer in this cause, if, in truth, any such existed.

5. "Opportunity to introduce evidence in contradiction of the evidence considered in support of the objections" was, of course, utterly lacking, where there was no notice that there was any such evidence under consideration.

6. "Opportunity for argument upon the testimony, law and fact" was, also, necessarily lacking under the circumstances, where neither the testimony and facts nor the legal propositions under consideration were known.

7. The "proper tribunal, competent to render judgment," under the theory of the appellant, itself, was the Third Assistant Postmaster-General, before whom no hearing was had, though sought for diligently. The testimony on behalf of appellant, itself, shows that the hearing contended for as having been accorded was before Bacon, who admits that he did not judge, but merely reported what he regarded as the material features of it to the Third Assistant Postmaster-General.

It will not be lost sight of that the invitation by the Department to the complainants to submit to a hearing upon a written answer, without the "expense and trouble incident to a trip to Washington," upon the assurance that such answer "will be given the same fair and painstaking consideration as though you appeared in person or by representative" was not accepted by the complainants. They de-

sired, and incurred the expense and trouble necessary to procure a hearing, in person or by representative, but without avail. As was remarked by the learned Judge of the District Supreme Court, "Mr. Heines might just as well have remained in New York, and have forwarded his answer by mail." The conclusion reached by that court that this was not the hearing contemplated by the statute, and by the law, we submit is unanswerable.

THE TAX CASES CITED BY THE APPELLEE ARE NOT IN POINT.

In reaching the opposite conclusion, the Court of Appeals seems to have been influenced by its understanding of the tax cases cited in its opinion.

We submit, however, that there is an obvious distinction between such cases and the case at bar.

In the tax cases a Federal Court is asked to interfere with the exercise of the ordinary taxing power of a State upon the ground of an alleged failure to afford such notice, merely, as is implied in the general conception of due process of law in taxation. French v. Barber Asphalt P. Co., 181 U. S., 324, 332. In our case a Federal Court is called upon to enforce the express mandate of the Federal Congress that a Federal Officer, before destroying a positive legal right already adjudged to exist by his predecessor in that office, shall first grant the interested party a hearing. Surely it cannot be said that publishers rights are no better secured since the enactment of this statute than if it had not been enacted at all.

POOR COPY

The hearing is not simply a deduction from the general notion of due process. It is a specific statutory direction that there shall be a hearing before a given property right is destroyed, and this hearing is required for the express purpose of protecting an established *status*—a *status* subject, doubtless, to be changed, but to be changed only after the bringing forward of reasons therefor and opportunity to be heard in respect to them.

> "What is due process of law depends upon circumstances. It varies with the subject-matter and the necessities of the situation." Myer v. Peabody, 212 U. S., 78, 84.

What are here the necessities of the situation?

A *status* has been created by executive action in pursuance of a given law. In reliance upon that *status* large investments of capital have been made and a business has been built up by efforts continued through a considerable number of years. Without any change in the law, and without any suggestion of fraud in obtaining it, it is proposed by executive fiat to destroy that *status*, on the property which has been built upon it, at great outlay of time, labor and capital. Do not the necessities of this situation obviously require an open, candid, and full statement of the grounds for the proposed change, and a full and fair opportunity to combat the grounds so stated by all the evidence and argument which the party deems important? Anything short of that is "arbitrary, oppressive, and unjust."

But, even in tax cases, the general conception of due process secures more protection than the Post Office Department has been willing to afford. In the most recent case cited by the Court of Appeals, Londoner v. Denver, 210 U. S., 373, the land-owners, though allowed to formulate and file complaints and objections to the assessment, just as the publishers were allowed to formulate written objections against the citation, were not afforded an opportunity to be *heard upon them.* This court held the assessment void:

> "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, *even in proceedings for taxation,* is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." Londoner v. Denver, 210 U. S., 373, 385-386.

CAUSE NO. 251.

The companion case, Frank H. Hitchcock, Postmaster-General, v. Frank Tousey, No. 251, is claimed to be distinguished from case No. 251 upon two grounds, only, both of which are wholly technical. They are, first, that the date set by the citation

POOR COPY

for the Tousey case was June 12th, and that no one appeared on that day; and, secondly, that, Mr. Heines not being an employee of Tousey nor yet an attorney at law, the appellant in the present case could not be regarded as having sought a hearing.

The facts are that, at his first visit to the office of the Third Assistant Postmaster-General on June 10th, Mr. Heines informed the clerk, the only party he was permitted to see, that he "represented Street and Smith and the Frank Tousey Publishing Company" (Rec., p. 46), and he gave the clerk, on that occasion, one copy of his answer for each of the publications of Street and Smith, and one for each of the publications of the Frank Tousey Company (Rec., p. 47), leaving these for the Third Assistant Postmaster-General, "to give him an opportunity to read the paper, to see if he had anything to ask the next day," accompanied by a message that Mr. Heines would call by appointment on the next day, at 2 o'clock (Rec., p. 47). When he accordingly called, was denied access to the Third Assistant Postmaster-General, and was referred to Mr. Bacon, he inquired of and was informed by that gentleman that he had received the document in question, had read it, but that he had not been informed, this time, what to say, and had not anything to say to him. Mr. Heines thereupon informed him that he would go back to the Third Assistant Postmaster-General, did so, was told that he was engaged, was further informed, on offering to wait, "It may take a long time," left a message that he would be at his hotel, returned to Mr. Bacon and informed

him he had been unable to see the Third Assistant Postmaster-General, and requested him to put him on record as having called, leaving at the same time a message with the clerk that he would await any telephone message which might be sent to his hotel, and would call at any time. No call came, and it was only after thus exhausting every reasonable means of securing an audience with the Third Assistant Postmaster-General that he despaired of doing so and returned to New York. No point was made by the clerk, by Mr. Bacon, or by anyone else that, as to the Tousey Company publications, the brief in respect to which had been filed on the 10th, the day for the hearing was on the 12th, or that the message "the man you want to see is downstairs," *i. e.*, Mr. Bacon, referred to the Street and Smith case and not to the Tousey case, or that audience with the Third Assistant Postmaster-General was intended to be denied only as to the Street and Smith case, or would have been possible in the Tousey case on the following day.

"It is a general rule that, when the tender of performance of an act is necessary to the determination of any right against another party, this tender to the other to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." Hills v. Exchange Bank, 105 U. S., 319, 321.

In addition to this answer, sufficient, we submit, to so technical an objection, there are, independently of it, the same objections of the want of notice, the

absence of specific charges, of an opportunity to be heard in respect to the evidence considered by the postal authorities, gotten into the case subsequently to June 11th or 12th, we know not how, and consisting of we know not what, that are applicable to the other case.

The second objection, that Mr. Heines was neither an employee of the Tousey Company or an attorney at law, cannot, we think, call for serious consideration. There is not, so far as the testimony discloses or our acquaintance goes, any Bar of the Post Office Department, nor any class of licensed or specially admitted practitioners before it. Mr. Heines very clearly was *pro hac vice*, employed by the Tousey Company to act for it in the matter of the proposed hearing. His sworn testimony in the case that he announced to the officials of the Post Office Department, or to such of them as he was permitted to see, that he appeared as the representative of Tousey and Company, that he filed with them the written answer on their behalf, that he called the next day and made his ineffectual attempts to gain a hearing, or be informed as to the questions he was to meet, is unchallenged.

It only remains to say in regard to the Tousey publications that the testimony in the case presently to be considered in regard to their literary quality, and to the charge of the answer that they are calculated to work harm and injury to those into whose hands they fall, is the same as that with respect to the Street and Smith publications appearing in the rec-

ord of the latter case. There is no difference at all between the two cases other than the two objections above noted, that the citation of the Tousey Company was by its terms returnable on June 12th, and that Mr. Heines was not, as it is claimed on behalf of the appellee, an employee of the Tousey Company.

POOR COPY

PART TWO

THE ORDER EXCLUDING APPELLANT'S PUBLICATION FROM THE SECOND CLASS WAS NOT GROUNDED ON ANY PROVISION OF THE STATUTE, BUT UPON SUPERADDED LIMITATIONS NOT FOUND THEREIN. IT IS THEREFORE VOID.

FIRST POINT.

The relegation of appellant's publications from the second to the third-class postage rate (whereby they are indirectly destroyed) cannot be justified upon the pretext of a personal literary and moral censorship unknown to the law.

We pass, next, to the second question involved, namely, was the order of exclusion valid upon the merits of the case?

One objection urged to the relief sought by the bill below, and which we submit neither is nor can be before the court for consideration, may be dealt with preliminarily, namely, the objection that the complainants' publications are of "an inferior order of literature" (Answer, Par. VIII, R., p. 16), and are "of such character as to work moral harm and injury to those into whose hands they are destined to fall, and whose minds are open to such improper influence, and should not have the assistance or aid of a court of equity in the continuance of a special statutory privilege, intended to make possible the widest and freest dissemination of information of general interest or instruction or educational value" (Par. XX, Rec., p. 24).

Congress has by certain laws authorized the complete exclusion from the mails of certain kinds of publications, irrespective of rates of postage. As to publications not falling within the prohibited class, the rates of postage at which they shall be received and transported have been prescribed by statute. The contention in question is that, as to publications admittedly not falling within the prohibited class, the Third Assistant Postmaster-General may, nevertheless, by an injurious classification as to rates, place them in an *Index Expurgatorius* of his own, by exercising a personal literary and moral censorship not authorized by law, and thus deprive them, in effect, of access to the mails, not by general regulations as was attempted in the Payne case, but by an arbitrary ruling in each individual case, exacting requirements additional to those fixed by statute for admission to the second class postage rate. We submit that the statement of the proposition is the conclusive answer to it.

But, in the second place, if the legal answer thus indicated were not conclusive, the objection here urged is new matter, not responsive to the allegations of the bill, and imposes, therefore, the burden of proof upon the appellant. Randel v. Brown, 2 How., p. 422; Boone v. Chiles, 10 Pet., p. 211. How has that burden been sustained?

On behalf of the appellants, Edward S. Ellis, an author of many school and other histories, and juvenile books, a public school teacher and superintendent of schools in New Jersey, whose books have been translated into various languages and who is a

POOR COPY

Princeton Master of Arts (Rec., pp. 95-6), testifies that the publications in question all teach "sturdy manhood, temperance, integrity, truthfulness, and hold up the highest ideals of boyhood"; that no oaths or concession to what may be called passion is to be found in them; that right conduct in the marital relations, the duties of children to parents and teachers, and the like, are taught emphatically and in unmistakable terms; that there is not the silghtest tendency to immorality in them; that they deal with American sports, such as baseball, football, boating, skating and hunting; that they condemn profanity, drinking, disrespect to parents, untruthfulness and the use of tobacco; that they are more uniformly moral and unexceptionable than the generally recognized monthly magazines; that their literary quality compares very favorably with the generally recognized standards of juvenile fiction; that the celebrated "Youth's Companion," while of higher literary merit, is not higher morally, and that the complainants' publications are fairly abreast of the best in juvenile fiction from a literary point of view—they are clean, pure and elevating (Rec., pp. 95-8).

Edward Stratemayer, an author and literary agent, the writer of about 80 books for boys, the author who completed the stories left unfinished by the late Horatio Alger (Rec., pp. 103-4), testifies that the stories are "clean, pure, up-to-date stories of boyhood life," advocating temperance, proper regard for parents and teachers, opposing gambling, excessive hazing, smoking, the use of cocaine, etc.; that their ideals are those of an American boy who

is manly in the best sense of the word, with proper regard for the feelings of those around him, and who wishes to do right under all circumstances; that the stories contained in them are calculated to elevate boys, to make them truthful, honest and upright, and in these particulars are fully the equal of the best boys books; that, while the "Youth's Companion" maintains a more equal level of high literary merit, the Tip-Top Weekly stories, from a purely moral and uplifting standpoint, are as good as any; that their quality is better than that of many of the popular ten and fifteen-cent magazines; that nothing more sensational is to be found in them than in Robert Louis Stevenson's "Treasure Island," fully ninety-five per cent of the juvenile fiction of the day containing more or less of adventure, and that they are not in any way detrimental to the reader (Rec., pp. 103-6).

John C. Dana, Public Librarian, professionally familiar with the general body of juvenile literature annually published in the United States (Rec., p. 115), testifies that the moral tone of the publications is good, making virtue and good triumphant, while vice meets its just desert; that they teach nothing out of the way in regard to the important moral questions; that they are stories of adventure, falling under the same head in that respect as "Treasure Island," the stories of Cooper, Alger, Ballantine and Kingston (Rec., pp. 115-16).

Both in the testimony and in the brief for appellant, a few of the more "catchy" or sensational titles out of the very large number of the weekly issues

of the Tip-Top Weekly are made the subject of comment, such as "Dick Merriwell's Skill, or The Prince of the Pistol"; "The Lost Senorita"; "Dick Merriwell's Joke, or Fun With the Jumping Frenchman," etc. No effort is made, however, to show that these stories differ in any respect, in point of literary merit or moral tone, from the character given them by the witnesses named; nor are copies of these issues offered as exhibits, as tending to prove either that the stories, whatever their titles, are of inferior literary merit, or unsatisfactory from any moral or other standpoint.

The only evidence in support of the allegation of the answer in the respect now under consideration is that of the witness Zed H. Copp, who combines the occupations of Assistant Pastor of Bethany Chapel and Chief Probation Officer of the Juvenile Court in this District (Rec., p. 133). He testifies that of the boys he has seen who read the publications in question, he cannot say that their offenses have involved moral turpitude, though he has found copies of these papers on boys who are under his supervision (Rec., pp. 134-5); that his investigation and observation as to the effect of *kindred* literature leads him to believe that it is disastrous to the young mind; that he has found, not this literature, but literature of this character, on delinquent, dissipated boys who use cards, beer, and steal their food (Rec., pp. 135-6); that it is unwholesome for two reasons, because the fiction is not true to life, and because it gives a false ideal of life, from which come incorrigibility and restiveness; that he notices the conspicuous absence of any-

thing in these publications that laud the commonplace, "about getting up early, doing the chores about the farm, sweeping out the store, etc."; on the contrary, the extraordinary is made prominent—the commonplace is lost sight of in the common herd, and that this is always harmful on the boyish life (Rec., p. 136); that they treat of hate, treachery, vandalism, robbery, drunkenness, fistic encounters, violations of school rules, gambling, tramp-life, murder and blackmail (Rec., pp. 128-140).

On cross-examination, he testifies that the basis of his judgment against these publications is that they are untrue to life, because the minds of the readers are unable to distinguish between the false and the true; because they deal with murder, hate, treachery and vandalism, and because they develop the idea that a boy has to be above the ordinary in every-day practical life, and do not place a premium upon its commonplace attitudes; that he thinks the right kind of books for boys are the Alger and Henty books; that these deal with boys who go from home to the city, distinguish themselves, become rich, famous and great; that he considers some of these Alger and Henty books objectionable, and would not allow them to come into his home; that their titles are "Ragged Dick," "Peter the Porter"; other titles are "Tried and True," "Sure and Slow," "Work and Win," of which he approves (Rec., p. 142); that he can't tell how many books of the Alger series there are which do not deal with arson, murder, theft, and slum life; that there is the greatest field for proper literature for boys, which he would

like to see occupied; that he has never read "Tom Brown at Rugby" or "Vernon Green"; that he has read "Robinson Crusoe," which does not inculcate the sweeping out of stores, the doing of chores, the staying at home, and commonplace life, but thinks it a good book for boys because it describes adventures that might happen to any poor fellow who was thrown on an island; that he knows none of the issues of the Tip-Top Weekly that deal with as unreal and improbable conditions as Robinson Crusoe; that he "started reading" Oliver Twist, and thought it a good and proper book, though dealing with the adventures of a street thief and with drunkenness and murder, because Oliver Twist evolves into something better; that he can mention no character in the publications involved in this suit in which the good came to evil eventually, or the bad to good eventually, without changing their way of life; that his review of these books was so like a kaleidoscope that, though they made an impression, he cannot "revert to any of them"; that if, before he signs his deposition, he can find in any of the publications a heroic or attractive character who is not a total abstainer from drink, does swear or use vile language, or who does not lead a good and moral life, he will be glad to designate him—which character he evidently failed to find, as he makes no such designation; that, in his career as Probation Officer since 1901, he cannot name any boy whose delinquency could be traced to reading these publications; that he thinks boys should read the History of the French Revolution, though that history deals with murder, treachery,

and vandalism, which literature as a general proposition is harmful to the young mind, and that he would like to see some copies of "the History of the French Revolution" expurgated (Rec., pp. 145-6); that there ought to be the widest distinction between deeds of men such as Napoleon Bonaparte and others who appear in history, and works which attribute heroic deeds to young boys, but that he thinks a boy might be allowed to read the story of David and Goliath, without demoralization.

Mr. Copp is the only witness adduced on behalf of the Government to sustain its charge that the publications in question are of a low order of literary merit, or that their tendency is harmful. There can be but one conclusion from this fact, namely, that no witness of higher literary qualifications, or of more capable judgment, could be found or produced for the purpose. An examination of the testimony as a whole, of this, the sole witness called for the appellee upon the point, will show plainly that the foregoing is an impartial and fair summary of it, and that it is not, as otherwise might be supposed, a parody or burlesque of his testimony.

SECOND POINT.

The exclusion of appellant's publication is really grounded not on the Act of March 3, 1879, but upon the amended regulation of July 17, 1901, already adjudged to be void.

Coming now to a consideration of the order of exclusion on its merits, we submit that the pleadings

and evidence in this case show quite conclusively that in excluding complainants' periodicals from the second class of mail matter the Post Office Department was really enforcing against appellants, while professing not to do so, the provisions of the amended regulation 276, of July 17, 1901, which has already been adjudged to be void.

The consideration of this point requires that the court should have the statute in question before it at the outset.

I. The conditions for admission to the second class are specified in a short, plain and explicit statute.

The statute establishing the tests for admission to the second class of mail matter is short and quite explicit. It begins as follows:

> "Sec. 7. Mailable matter shall be divided into four classes:
> First, Written matter;
> Second, Periodical publications;
> Third, Miscellaneous printed matter;
> Fourth, Merchandise."
> March 3, 1879, Ch. 180, Sec. 7, 1 Supp., 454.

In the next section the act goes on to say what is meant by first class, or written, matter.

> "Sec. 8. Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing except as hereinafter provided."

The "hereinafter provided" refers simply to certain permissible writing which, when placed upon matter of a lower class shall not, in spite of what is said about "writing" render it chargeable as first class under this section.

Having thus defined what is meant by written matter the statute proceeds to do the same for periodical matter.

> "Sec. 10. Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in Sections 12 and 14."

After then proceeding in Section "11," to declare the postage rate for second class matter, and in Section "12" to charge it with a higher rate in case matter of a higher class is enclosed with it (a proviso, however, especially exempting and authorizing the insertion of advertisements) the statute goes on, in Section "14," to elaborate the tests for the admission of second class matter, and specify the conditions upon which it shall be admitted:

> "Sec. 14. The conditions upon which a publication shall be admitted to the second class are as follows:
>
> First. It must be regularly issued at stated intervals, as frequently as four times a year and bear a date of issue and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguished printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided*, however, that nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

March 3, 1879, Ch. 189, Sec. 14, 1 Supp., 454.

II. It is conceded that appellant's publication complies with every specified condition prescribed by this statute as a test for admission to the second class.

The sole defense is that it is not also "a periodical in the ordinary meaning of that term" as employed in the statute.

If the Postmaster-General is wrong about that, there is nothing to sustain his order of exclusion and it must be set aside.

That the publication is well within the scope of the meaning which Congress deliberately intended to attach to the term "periodical" can, we think, be established to a demonstration.

But we note, first,

III. The long-continued and general acceptance of this publication as a periodical.

Under the statute quoted above, which in the thirty years since its passage has never been amended or modified in any particular and which is the law governing this case, the complainants' publication, after due proof of its compliance with the statute in all respects and a determination to that effect by the Third Assistant Postmaster-General, was, on March 1, 1897, regularly admitted to the second class as a periodical publication.

Bill of Complaint, Par. IV (Rec., p. 2).
Certificate of Entry (Rec., p. 45).

It is only some ten years later, after the publication has reached its six hundredth issue, that a new Third Assistant Postmaster-General, or a new Assistant Attorney-General, holds that it is not a periodical. During the intervening years, that is to say, during the administration as Postmaster-General of James A. Gary, Charles Emory Smith, Henry C. Payne, Robert J. Wynne, and George B. Cortelyou, this publication passed regularly and continuously through the mails as a periodical. It was treated by the public as a periodical publication and has been so ever since it was established. It is distributed in the same manner as the great mass of periodicals, in response to a demand from the newsdealers, through the American News Company for copies to supply their subscribers (Rec., pp. 63, 67). Is not this enough in itself to cast suspicion upon the

soundness of the Postmaster-General's proposition and to impose upon him the burden and the duty of establishing it?

But this is by no means all.

IV. The construction of the term "periodical" accepted and acted on by the Post Office Department at the time when appellant's publication was admitted is a construction contemporaneous with the Act of March 3, 1879, itself, and thereafter followed and enforced for twenty odd years.

The Government does, and must, concede this.

V. That construction was, moreover, the established construction of the same term in prior postal statutes and, as such, was consciously, deliberately, and studiously adopted by Congress in the framing of this Act.

The only *new* things in this Act of March 3, 1879, are the very things which the Postmaster-General admits that this publication does comply with, namely, the specified conditions in Section 14. The things he says it does not comply with, namely, the terms "periodical" or "periodical publication," are, on the contrary, things simply repeated and carried forward from the previously existing law.

In that law they had an established scope and meaning well known to Congress, and, in truth, especially and specifically drawn to its attention by the Post Office Department for the express purpose of having Congress change it. For this purpose, the

Department drafted the very bill which afterwards became the Act of March 3, 1879, but from which bill, before its passage, the proposed change was first eliminated, Congress refusing to permit it and *de industria* continuing the old meaning. This refusal was acquiesced in by the Post Office Department, and it proceeded to follow and apply the old construction in executing the new law for the next thirty years.

The meaning and scope of the term periodical thus accepted and continued was much wider than is needful to admit appellant's publication. It embraced serial publications and appellant's publication is not a mere serial publication. But it is, of course, conclusive of appellant's right, for, if serial publications are included, *a fortiori* is appellant's publication included.

We proceed now to show that Congress, when it framed the Act of 1879, was specifically asked to change the law so as to exclude serial publications and refused to do so.

A. During the years immediately preceding the Civil War the postal law in force was the Act of August 30, 1852, Ch. 98 (10 Stat. L., pp. 38, 39), which provided for the admission to the mails at special rates for advanced payment of a class embracing "newspapers and periodicals."

As early as 1859, the administration of the postal service was already accepting in the mails, under the designation of "periodicals," serial publications, issued monthly or bi-monthly, consisting of small paper-bound books, forty-eight to sixty-eight pages

in size, each containing a complete novel (Rec., p. 56).

By the Act of March 3, 1863, Ch. 71 (12 Stat. L., pp. 701, 707), Congress made a general classification of mail matter, the class entitled to the specially favorable rate being designated in Sections 35, 36, as "newspapers, magazines and other periodicals" and as "newspapers and other periodicals." It appears that in the following year, 1864, some objection was made as to the further acceptance of the serial publications, above described, under the designation of periodicals, but the objection did not prevail, and such serial publications continued, as theretofore, regularly to be accepted as periodicals (Rec., pp. 55, 56).

The postal laws were again revised with amendments by the Act of June 8, 1872, Ch. 335 (17 Stat. L., 301). The term "periodical" was again carried forward from the existing law.

The provisions of this Act were incorporated into the Revised Statuttes as Sections 3875 *et seq.* See especially Sections 3884-3886, 3905, 3906, 3908, R. S., U. S.

In the Act of June 23, 1874, ch. 456 (18 Stat. L. 231, Sec. 5, 6, 9), Congress again made use of the terms "newspapers and periodical publications" as the designation of the second class of mail matter. Under this law, also, the serial publications continued to be accepted as before.

B. The impatience with which the postal authorities viewed the growth of this class of serial publications led to renewed efforts on their part to bring

about the exclusion of them from the second class. An attempt made in 1877 to accomplish this by administrative change in the construction of the existing law was thwarted by the decision of Attorney-General Devens in the case of the *Lakeside Library* (15 Op. A. G., 346).

In his opinion, the Attorney-General confirmed the long accepted construction in these words:

> "The proper definition of periodical publication seems to me to be substantially this: every printed paper printed and published periodically in parts or numbers at definite intervals."

This attempt, though unsuccessful, created much alarm among the general mass of publishers, who felt that their investments in their business rested upon an extremely precarious basis if the established practical application of the postal laws could be overthrown by a sudden administrative change in the construction of a single word such as "periodical."

C. Shortly thereafter, on October 22, 1877, Mr. A. H. Bissell, Law Clerk at the Post Office Department, made a draft of a new classification bill, which, together with an explanatory letter, he submitted, by direction of the Postmaster-General, to the publishers of the country, through their recognized organ, the Publishers' Weekly (Rec., pp. 73, 74). This draft bill, in its definition of second-class matter entitled to the privileged rate, expressly provided that "nothing herein contained shall be so construed as to admit books, either bound or unbound, or publi-

cations which although issued in a regular series or successive numbers, are but books or reprints of books, to the benefit of the privileged rate." (Rec., p. 75.)

This part of Mr. Bissell's project was very unfavorably received by the publishers of the country. On November 22, 1877, Mr. Money introduced in the House a classification bill (H. R., 1546) obviously framed upon Mr. Bissell's draft, but the provision aimed at serial publications was now restricted to publications "which although issued in regular series or successive numbers, are but reprints of books." (Rec., p. 76.) But even this limited prohibition was vehemently opposed.

D. At the invitation of the Chairman of the Committee on Post Offices and Post Roads, to which this bill was referred, the leading publishers of periodicals of all kinds met with him in consultation. (Rec., p. 79.) About four months after the introduction of the bill, March 16, 1878, the Chairman reported from the committee a new bill (H. R., 3850), with the same title as the one introduced on November 22, 1877. But the prohibition against serial publications was entirely omitted. In its place appeared a proviso against publications designed primarily for advertising purposes. (Rec., 77.)

This bill, being recommitted, was again, on April 16,1878, reported back by the Chairman with amendments and committed to the Committee of the Whole. The corresponding section of the new bill was identical with that previously reported on March 16, 1878. (Rec., p. 77.)

Just one week later, April 23, 1878, the Postmaster-General wrote to the Chairman of the House Committee saying of this bill (H. R., 3850), "the main features of the bill and most of its details had been agreed upon by your committee after careful consideration by the Officers of this Department, and the representatives of the publishing interests of the country." (Rec., pp. 73, 77-78.) The Chairman, Mr. Waddell, in reporting it said:

> "It is approved, not only by the Post Office Department, but by the publishers of the country of all kinds of publications." (Rec., p. 79.)

Thus it will be seen the prohibition proposed by Mr. Bissell had been eliminated by common consent.

The further legislative history of this bill is set out in detail in the Record (Rec., pp. 78 to 84). Briefly, it is this: On January 27, 1879, the House Committee reported a new bill (H. R., 5735), with the same title as H. R. 3850. The bill is identical in its omission of the proposed prohibition against serial publictaions, its place being taken by the prohibition against publications designed for advertising.

Meanwhile, in the Senate, after the introduction of Mr. Money's first bill, November 22, 1877, but before the committee's substitute reported on March 16, 1878, namely on January 17, 1878, a bill had been introduced (S. 539) which contained in identical terms the proposed prohibition against serials consisting of reprints of books.

On May 15, 1878, after the letter of the Postmas-

ter-General above quoted, the Senate Committee in like manner reported a substitute bill (S., 1251), from which this prohibition was omitted. (Rec., pp. 80-81). The section in question was identical in its terms with H. R. 3850, reported on April 16th. And those terms are the terms of the now existing law. Neither the House bill nor the Senate bill, as a separate enactment, became a law, but when the Post Office Appropriation bill came over from the House, the Senate Committee, acting through the same Chairman who had first introduced the bill with a prohibition against serial publications, tacked the provisions of S. 1251 to the Appropriation bill as Amendment No. 20. After disagreement and repeated conferences, the House agreed to the Amendment (with slight change of phrasing not here involved) and the appropriation act of March 3, 1879, became a law with those provisions respecting second class matter reported in H. R., 3850, and which are still in force.

E. Thus the proposed alteration of the law whereby the Post Office Department had hoped to accomplish the exclusion of serial publications was definitely rejected by Congress after eighteen months of investigation and consideration. That rejection, moreover, was made with the express concurrence as well of the Post Office as of the publishers themselves.

F. This Act of March 3, 1879, was regarded as having settled all controverted questions and established a uniform and permanent construction. In his report for 1879 (pp. 8, 34, 35), the Postmaster-General said:

"The law providing for a new classification of mail matter and readjusting the rates of postage thereon passed at the last Session of the 45th Congress, which went into effect on the first day of May last, has given *universal satisfaction*. In framing regulations to carry it into successful operation the Department has endeavored to display the same liberal spirit which actuated Congress in its passage. Such reports as have been received from various officers of the service show that it is better understood by the public than the former law, has served very much to diminish complaint against the administration of the different Post Offices throughout the country and has removed very much of the friction that existed in the service under the old law. Especially is this true in respect to second-class matter." (Rec., p. 73.)

G. After, as before, the passage of the new Act, serial publications continued to be received and transmitted as periodicals. In fact, under the new law, they greatly and rapidly increased. With full knowledge of this fact, Congress, nevertheless, by the Act of March 3, 1885, reduced the rate upon them from two cents to one cent per pound.

H. We respectfully submit that the meaning and scope of the terms "newspapers" and "periodicals," and "Periodical Publications," as construed in practice in the administration of the Acts of 1852, 1863, 1872 and 1874, were adopted by Congress, studiously and with express intent, in its repetition of the same terms in the Act of 1879, and this, too, in denial of a clear, distinct, and positive request so to limit those terms as to exclude the publications which the Department now says those terms do not embrace.

It is a settled rule of statutory construction that

where it appears that Congress knew how certain terms in the previous law had been construed, the repetition of those same terms in a subsequent statute indicates that the construction was adopted along with the terms and that "a like construction was intended, and was expected, to be given" to them. *Repetitio verborum indicat acceptationem in eodem sensu.*

Mason v. Fearson, 9 How., 248, 258;
Reiche v. Smythe, 13 Wallace, 162, 164;
The Abbottsford, 98 U. S., 440, 444;
Claflin v. Commw. Ins. Co., 110 U. S., 90, 93;
New Haven R. v. Interstate Com. Com., 200 U. S., 361, 401, 402;
U. S. v. Falk & Bro., 204 U. S., 143, 152;
U. S. v. Hermanos, 209 U. S., 337, 339;
White-Smith Co. v. Apollo Co., 209 U. S., 1, 14;
B. & O. Southwestern R. R. v. U. S., 220 U. S., 94, 103.

Just as in the case of previous judicial construction, a known construction made by the officers charged with the enforcement of the statute is treated as if read in the subsequent statute.

> "We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the *body charged with the enforcement of a statute*, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without

alteration in the particulars construed, when not plainly erroneous, *must be treated as read into the statute.*"

New Haven R. R. v. Interstate Com. Com., 200 U. S., 361, 401, 402.

"This, then, is our view: The Attorney-General having construed the proviso of Section 50 of the Act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and *this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of Section* 33 of the Act of 1897, and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse."

U. S. v. Falk & Bro., 204 U. S., 143, 152.

But, in the case at bar, we have something more than mere conscious repetition. We have, in the first place, an attempt to amend the law into the effect or sense in which it is now sought to be construed, and a deliberate rejection of that amendment. This should be conclusive.

U. S. v. Press Publ. Co., 219 U. S., 1, 10.

This Court has never failed to take into consideration "the genesis and development of the legislation" which the Act in question embodies. It seeks to place itself in the light of "the situation as it existed and as it was pressed upon the attention of the legislative body." (143 U. S., 463.) In so doing, the

amendments to which an Act has been subjected before it reached its final legislative form are deemed to afford "a specially efficacious means for discerning its intent and purpose."

U. S. v. Press Publ. Co., 219 U. S., 1, 11, 13;
Chesapeake & Pot. Tel. Co. v. Manning, 186 U. S., 238, 243;
Holy Trinity Ch. v. U. S., 143 U. S., 457, 463-4;
Coosaw Mining Co. v. South Carolina, 144 U. S., 559, 561;
Platt v. Union Pac. R. Co., 99 U. S., 48, 64;
Blake v. Nat. Banks, 23 Wall., 307, 319.

We have, in the second place, the additional fact, that the words, as repeated in the new Act of 1879, were immediately given the same construction as under the prior law, by the officers charged with their enforcement, *notwithstanding that these officers had themselves endeavored to have the law changed.* "This is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

Schell's Ex. v. Fauché, 138 U. S., 562, 572;
U. S. v. Hill, 120 U. S., 169, 180, 182-3;
Hahn v. U. S., 107 U. S., 402, 406;
Butterworth v. U. S., 112 U. S., 50, 67-68;
Philbrick v. U. S., 120 U. S., 52, 59;
Bate Refg. Co. v. Sulzberger, 157 U. S., 1, 44-45;
U. S. v. Haley, 160 U. S., 136, 141, 145;
Hewitt v. Schultz, 180 U. S., 139, 157;
Midway Co. v. Eaton, 183 U. S., 602, 609;
U. S. v. Finnell, 185 U. S., 236, 244.

1. Not until the administrations of Postmasters-General Key, Maynard, James, Howe, Gresham and Hatton had successively passed, and the history of the Act of March 3, 1879, had been apparently forgotten, was the question of the admission of serial publications again raised.

The first to raise objection was Mr. H. R. Harris, who became Third Assistant Postmaster in 1887. In his report for 1887, he ventured, "notwithstanding," as he said, "the limited experience I have had with relation to the entry, mailing, and transmission of second class matter" (p. 899), to assert that their admission was an abuse which the law never intended and which defeated its object.

> Rep. 3rd Asst. P. M. G., 1887, pp. 899, 901-902, House Ex. Doc., 1st Sess., 50th Cong., 1887-88, Vol. 9.

His recommendation that the law be amended so as to exclude "books or reprints of books whether issued complete or in part, bound or unbound, and whether sold by subscription or otherwise" renewed also in his report for 1888 (pp. 679, 680), received no mention in the report of his superior, the Postmaster-General, for either year, although a bill for the purpose was introduced in Congress.

> Rep. 3rd Asst. P. M. G., 1888, pp. 679-680, House Ex. Doc., 2nd Sess., 50th Cong., 1888-89, Vol. 9.

The truly aggressive attack came from Mr. John Wanamaker, who became Postmaster-General the

following year, 1889. Being, like Mr. Harris, evidently unaware of the circumstances under which the Act of 1879 had been passed, he stated in his first report that the admission of serial publications was "an evasion of the law" contrary to its original intent, and brought about through an administrative error in its construction.

Rep. P. M. G., 1899; House Ex. Doc., 1st Sess., 51st Cong., Vol. 10, No. 1.

This mistaken statement, being constantly repeated with increasing emphasis in subsequent reports, came at last to be generally accepted as a fact among those connected with the postal administration. Ten years after Mr. Wanamaker's first declaration to that effect, Postmaster-General Charles Emory Smith is found reiterating in his report for the year 1899, that the admission of serial publications was "wholly outside the intent of the law," and that to exclude them was "not to change what Congress meant to establish, but to lop off the excrescences." He further characterized their admission as "a practical infraction of the law" and as "transparent and flagrant."

Report P. M. G., 1899, House Ex. Doc., 1st Sess., 56th Cong., Vol. 16, part 1.

Two years later, when he undertook, by the amended departmental regulations of July 17, 1901, to put an end to what he called this "palpable evasion of the law," he stated in his annual report to his justification to be that "an enormous abuse has

grown up in the transmission at the pound rate of large quantities of paper-covered books printed and issued under the pretense of being serial publications. They are in no sense periodicals. * * * They are not lawfully in the second class and the just administration requires their exclusion."

Report P. M. G., 1901, House Ex. Doc., 1st. Sess., 57th Cong., Vol. 21, No. 4, p. 20.

J. Meanwhile, as stated, following Mr. Harris' "note of alarm" and Mr. Wanamaker's vehement attack, repeated appeals had been made to Congress to amend the law.

1. In 1888 there was introduced a bill (H. R., 4910, 50th C., 1st S.), for the amendment of the Act of March 3, 1879, by adding the following proviso:

> "And that no publications that are books or reprints of books, whether they be issued complete or in parts, bound or unbound, or in series, or whether sold by subscription or otherwise, shall be admitted to the mails as second class matter."

2. In 1889 another bill (H. R., 7558, 51st Cong., 1st S.) was introduced to the same effect.

3. On April 24, 1894, an amendment to the same effect was offered to the Post Office Appropriation bill in the House of Representatives. After debate it was rejected.

4. In 1895 still another bill (H. R., 4566, 54th C., 1st S.) was introduced to the same effect.

5. On December 17, 1897, still another bill (H. R.,

5359, 55th C., 2nd S.) was introduced for the same purpose. (Rec., pp. 58-59.)

6. Another bill (H. R., 11,224, 55th C., 3d S.) was introduced to the same effect. (Rec., p. 59.)

7. Still again, on January 12, 1900, another bill (H. R., 6071, 56th C., 1st S.) was introduced in the same terms. (Rec., p. 60.)

Each of these bills successively failed to become law. In the debate on the first of them a few members who had survived the profound political changes which had occurred since 1879, such as Mr. Cannon, stated that, unless their memory misled them, the legislation by which these serial books were passing had been "advisedly had." (C. R., 50th C., 1st S., Vol. 19, p. 911.) No reference, however, was made to the legislative history.

It is true that other members expressed the view that it was an abuse, which began in a misconstruction of the statute, and that the only object of the proposed bill was to prevent evasions of existing law.

While the statement of Mr. Cannon, as a member participating in the passage of the Act of March 3, 1879, itself may be regarded as evidence of an historical fact, the views of other members not so situated are clearly inadmissible, and within the rule laid down by this Court, that an expression of opinion in debate is not appropriate evidence of legislative intent.

United States v. Union P. R. Co., 91 U. S., 72, 79;

U. S. v. Freight Ass'n, 166 U. S., 293, 318.

But the refusal of Congress to accept the repeated recommendation of the Post Office Department to restrict the second class mailing privileges was equivalent to affirmative action in maintaining the *status quo*.

Chiles v. Chesapeake & O. Ry., 218 U. S., 71, 76;
Welton v. State of Missouri, 91 U. S., 275, 282.

K. Notwithstanding the refusal of Congress to change the law, Postmaster-General Charles Emory Smith, firmly believing that the admission of serial publications was an evasion of and contrary to the Act of March 3, 1879, due to an administrative mistake in the construction of the Act, thereafter blindly followed as a precedent, determined to lop off the supposed "excrescence" by means of a new administrative construction of the statute.

He accordingly promulgated, under date of July 17, 1901, the following amendment to Postal Regulation 276, viz:

"SEC. 276. Postal Laws and Regulations, Edition of 1893 is hereby amended to read as follows:

"SEC. 276. General Definition. Mailable matter of the second class shall embrace all newspapers, and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections 12 and 14 (Act of March 3, 1879, sec. 10, 20 Stats. 359). The sections referred to are 293 and 277. Second-class matter

above described is of two kinds: (1) That sent by other than publishers or news agents (sec. 299). (2) That sent by other than publishers or news agents (sec. 302). 'Periodical publications' herein referred to are held not to include those having the characteristics of books, but only such as consist of current news or miscellaneous literary matter, or both (not excluding advertising, and conform to the statutory characteristics of second-class matter.

"CH. EMORY SMITH,
"*Postmaster-General.*"

This amended regulation 276 came before the courts in Payne v. Railway Pub. Co., and was adjudged to be void as "clearly in excess of the statute" and as "prescribing conditions which the Statute does not prescribe." (20 App. D. C., p. 598.)

Railway Pub. Co. v. Payne, 30 Wash. Law Rep., 338;
Payne v. Railway Pub. Co., 20 App. D. C., 581.

Later, however, the exclusion from the second-class of the *Riverside Literature Series*, accomplished independently of the regulation, was sustained by the Court of Appeals (reversing the Supreme Court of the District) upon the theory that a series of distinct reprints connected only by the fact of successive issue under a serial name and number did not constitute a periodical within the meaning of that term as used in the Act of 1879.

Houghton v. Payne, 22 App. D. C., 334.

That decision, upon appeal, was sustained by this Court.

Houghton v. Payne, 194 U. S., 88.

Both here and in the courts below, great stress was laid in argument upon the long continued construction of the Act of March 3, 1879, and the *subsequent* fruitless appeals to Congress to change that law. But the origin and legislative history of the Act itself escaped the research of counsel, and the correctness of the accepted administrative view, repeated for years in the reports of the Postmaster-General, that the admission of serial publications originated in an administrative construction of the Act of 1879, was not questioned.

Not having before them the unknown legislative history of the Act, this Court, as well as the Court of Appeals, held that serial publications, notwithstanding their compliance with Sec. 14, were not within the meaning of the term "periodical."

If, as we submit, the action of Congress shows conclusively what it intended the term to include, it would seem to follow that the decision in *Houghton's* case cannot be taken in subsequent cases as authoritatively ascertaining the intent of Congress to be the reverse.

Barden v. North. Pac. R. R., 154 U. S., 288, 322;

Kilbourn vs. Thompson, 103 U. S., 176, 196, 199-200;

The Legal Tender Cases, 12 Wall., 457, 554.

L. At any event, the decision in Houghton v. Payne should be rigidly limited to the precise facts of that case, and should not be extended by analogies to cases not strictly within its scope.

Harriman v. Nor. Sec. Co., 197 U. S., 244, 291;
Pollock v. Farmers L. & T. Co., 157 U. S., 429, 574.

Now the whole case against appellant's publication is an obvious attempt to stretch the language of *Houghton's* case to include cases not contemplated by the decision itself. That decision was never understood to exclude publications like appellant's until a new third assistant postmaster-general, having come into office but a few months before (Rec., p. 149), so held in 1897. The officials who had excluded *The Riverside Literature Series* in 1902 made no exclusions of publications like *Tip Top Weekly* during the three years following the affirmance of their action by this Court in 1904.

Nor can appellant's publication, by any fair or reasonable deduction, be brought within the principle there decided. Putting on one side all considerations as to the real congressional purpose, and assuming *Houghton v. Payne* to lay down the true criterion, appellant's publication is not a succession of separate and distinct books, bound together by a serial number, but a periodical within the historic, literary and recognized meaning of the term.

THIRD POINT.

Irrespective of all evidence as to the intent and purpose of Congress, appellants' publication is a periodical in the ordinary meaning of the term.

I. What definition, if any, did the department act on?

Let us inquire, first, what definition, if any, the Postmaster-General is really applying?

Unless his definition be the same as is embodied in amended Section 276, afterwards known as Par. 2, Sec. 432, P. L. & R., which, although adjudged void, remained at the time of the exclusion unaltered and unrescinded in the official edition of the Postal Laws and Regulations (Bacon, Rec., p. 179), it is clear that the Postmaster-General has not formulated any general definition which may serve as a guide to the publishing world and by which cases coming before him may be tested and decided.

If, in truth, he is acting upon any other definition, we must get at it by inference only.

In the paragraph of his answer in which the Postmaster-General admits that complainants' publication complies with all the statutory requirements, he avers, by way of avoidance as it were, that "nevertheless internally, in substance and in general contents the publication does not have the characteristics of second class matter, but is in fact a book." (Answer, par. V., Rec. p. 14.) Realizing, perhaps, that the mere assertion that it is in fact a book, does not make it a book, he goes on to say that the publication does not have the characteristics of second class

matter: (a) in that there is no connection between the different numbers in the nature of the articles appearing in them; and (b) in that the publication implies no continuity of a literary character, such as distinguishes periodical publications from books, that each issue is complete in itself, and indicates no relation with prior or subsequent numbers. The only connection of the successive issues, he says, is that each bears the title "Tip Top Weekly," and the issues are numbered consecutively.

Answer, par. V. (Rec., p. 14.)

(a) It is plain the officers making that assertion had never read two consecutive numbers of the "Tip Top Weekly." Waiving, for the present, the question as to how far these internal characteristics, mentioned by the Postmaster-General, are, in any wise, essential elements of the definition of the term "periodical," either in its legal, its popular, or its administrative sense, it is sufficient to point out that there is, in fact, the very closest "connection between the different numbers of this periodical in the nature of the articles appearing in them," and that it would be exceedingly difficult for the Postmaster-General, or any one else, to indicate any ordinary periodical in which there is greater continuity of literary character.

If one takes up two successive numbers of a magazine, the most striking and obvious fact of connection between those numbers will be found to consist in the continuation in the second number of one or more articles of fiction existing in the first. But for this

element of continuing fiction, it would be exceedingly difficult to discover, in the average magazine, any "connection between the different numbers in the nature of the article appearing in them." And, except for external features of physical form, size and date, the contents of any number of one monthly magazine could, but for the continuing fiction, just as well be substituted for any number of any other magazine.

In the case of these mazagines, dozens of which are now, by the judgment of the Postmaster-General, being transmitted as periodicals, it might be well said that there is no connection between the successive numbers save only in the title and the numbering. But in respect of the complainants' publication, this statement is not true.

(b) It is a little difficult for any one having even a slight familiarity with the history of English literature to discuss with patience a statement that this publication implies no continuity of a literary character.

The most convincing element of literary continuity in periodical literature is identity of authorship. The very term periodical came into use as a noun-substantive in connection with those periodical publications of the Age of Anne in which the element of continuity was alone given by identity of authorship. When we speak of the *Tatler* or the *Spectator,* as an entity, we are speaking really of the personality of Steele and Addison. Even more obviously when we speak of the *Rambler,* we speak of Samuel Johnson. It would indeed require somewhat more than ordinary courage to exclude, as not being periodicals, the

very things which gave us the term. That the Department is not ready to do this, and there is some other undisclosed reason for the exclusion of complainants' periodical than want of continuity of literary character, is demonstrated by the Department's unquestioned acceptance of, among others, the *Philistine*, in which if there be any element of continuity other than that of the personality of Elbert Hubbard, it is yet to be discovered.

If then, the Department concedes, as it must, that continuity of authorship is continuity of literary character and that neither the *Tatler*, the *Spectator*, nor the *Rambler*, any more than the *Philistine*, can be excluded from the periodical class, how much less can the "Tip Top Weekly" be excluded, where, in addition to continuity of authorship, we have unbroken and closely knit continuity of subject-matter?

The objection erroneously made in this case that in subject-matter each number is complete in itself, would, indeed, apply to many, if not most, of the numbers of the classic periodicals. Their numbers, in respect of subject-matter, were, in truth, complete and were made continuous only by the personality of authorship; but in the case of the "Tip Top Weekly" the numbers are *not* complete in themselves and have on the contrary a distinct and obvious literary sequence.

If the *criteria* set up by the Postmaster-General be true ones, these publications are, therefore, more periodical than the original periodicals themselves. In short, the first answer to the Postmaster-General is that his criteria, if they be valid under the statute, are gratified.

But are his *criteria* valid? Are they the *criteria* of the statute? Are they definite and certain elements of a definition generally and uniformly applied? But it is obvious from the Postmaster-General's own administration of this law that they are not. If want of connection between the articles in successive numbers destroys the periodical character of a publication, what is to be said of the following, which are admitted by him as periodicals without question:

Young's Magazine, Complete Stories. Complt. Ex. No. 2, August, 1907 (Rec., p. 34).

Short Stories, Complt. Ex. No. 3 (Rec., p. 34).

Trans-Atlantic Tales, Complt. Ex. No. 4 (Rec., p. 35).

The Gray Goose, Complt. Ex. No. 5 (Rec., p. 35).

The Black Cat, Complt. Ex. No. 6 (Rec., p. 35).

The Red Book, Complt. Ex. (Rec., p. 71).

The Blue Book, Complt. Ex. (Rec., p. 71).

Lippincott Monthly Magazine, Dec., 1907, Complt. Ex. (Rec., p. 69).

The Philistine, August, 1907, Complt. Ex. (Rec., p. 69).

A Little Devil, May, 1907, Complt. Ex. (Rec., p. 69).

Masters in Art. A Series of Illustrated Monographs, March, 1908. Part No. 99. Complt. Ex. (Rec., p. 71).

The Burr McIntosh Monthly, July, 1908, Vol. XVI, No. 64. Complts. Ex. (Rec., p. 71).

Each number of the publications named is absolutely complete in itself. Many of them are publicly advertised so to be, and are sold largely upon the strength of that circumstance. Take *Short Stories,* for instance; there is no connection whatever between the stories in one number and the stories in the next; each story is complete in itself and each number is complete in itself. *Complete Stories* shows that it is the same by its very title. So as to the rest, *Gray Goose, Black Cat,* and all. Clearly, then, self-completeness is no bar to periodical character, and it would be mere stultification for the Postmaster-General so to assert. The fact that he does so in his answer arises from an effort to back up his decision in this case by an unwarranted stretching of certain dicta in *Houghton v. Payne,* applicable perhaps to that case, but by no means applicable to the state of facts here. Then let us see—

II. What was the case of Houghton v. Payne and what did it decide?

In the first place, what were the facts upon which the case was decided?

1. The publications in question were a series known as the Riverside Literature Series. What the series consisted of is well shown by the five successive specimens then before the court as exhibits. They were described by the Court of Appeals in its opinion (p. 239) thus:

"First. A complete republication of *Henry Esmond,* with thick paper cover and linen back. Above the title, with name of author and publishers, appear the words 'Riverside Literature Series' in large letters. Near the top of the cover appears the following: 'Issued monthly. September to June, No. 140 (Quintuple Number). February 7, 1900.' Near the bottom appears list of prices: 'Single numbers, 15 cents; double numbers, 30 cents; triple numbers, 45 cents; quadruple numbers, 50 cents; quintuple numbers, 60 cents.'

Second. *Three Outdoor Papers,* by T. W. Higginson, No. 141.

Third. *Sesame and Lilies,* by John Ruskin, No. 142.

Fourth. *Plutarch's Alexander the Great,* done into English by Sir Thomas North, No. 143.

Fifth. *The Books of Legends,* by Horace E. Scudder, No. 144. All of these, save in title, date, and number, bear the same imprint as *Henry Esmond.*"

Payne v. Houghton, 22 App. D. C., 234, 239, 240.

We have offered in evidence here three of the specimens referred to in order that the court might see with its own eyes what was before the court in that case and what the subject-matter of the opinions really was.

2. There were also properly before the court (for there was no question as to the validity of the hearing in that case) certain matters *dehors* the publication, such as announcements, catalogues, etc., of the publishers, which were thus summarized by the Court of Appeals:

"Other exhibits consist of catalogues of the publishing company, giving titles, prices, etc. Prefatory notes in these announce the purpose of the publishers 'to issue in inexpensive *form for school use* the most interesting and instructive masterpieces of the greatest writers of England and America,' and also inform the public that while each number has been issued in paper covers, many *single numbers* and *many combinations of numbers* have been bound in linen covers in *response* to a *demand* for a larger amount of material in a single volume with a more permanent binding. The price list gives the cost of the paper numbers and also the bound volumes. Bound volumes sent at purchaser's cost; paper backs are postpaid."

Payne v. Houghton, 22 App. D. C., 234, 240.

3. Another important fact before the court is thus stated in the opinion of that court:

"Another feature that distinguishes the 'Riverside Literature Series' from the ordinary periodical is that it has no 'back numbers' that may become practically valueless and dead matter, so to speak, in so far as the mailing privilege is concerned. No. 1, first issued in 1886, is as much alive as, and possibly more than, the latest number of 1902 or 1903. It is Longfellow's Evangeline, and the catalogue of 1902 announces 'a new and enlarged edition with introduction, notes and illustrations—the only authorized school edition,' and offers it in paper covers or bound in cloth."

Payne v. Houghton 22 App. D. C., 234, 248.

All the facts which were before that court were before this court on appeal. The whole matter was thus summarized by this court in its opinion (p. 95):

> "The publications are small books, 4½ by 7 inches, in paper covers, and are issued from the office of publication either monthly or quarterly, and numbered consecutively. Each number contains a single novel or story, or a collection of short stories or poems by the same author, and most, if not all of them, are reprints of standard works by Thackeray, Whittier, Lowell, Emerson, Irving, or other well-known writers, and from a literary point of view are of a high class. Each number is complete in itself and entirely disconnected with every other number. Upon the front page of the cover appears, at the top, the words 'Issued Monthly,' followed by the number of the serial and the date of issue. Below, the words, 'Riverside Literature Series' are prominently displayed and in the center of the page appears the name of the book."

Again at p. 98:

> "The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation."
> Houghton v. Payne, 194 U. S., pp. 95, 98.

Such was the state of facts upon which the case was decided and with reference to which the opinions must be read. Now what was decided? The only contention urged by Houghton & Mifflin for the classification of these books as periodicals was that

"this series becomes a periodical by a compliance with the conditions of Section 14." (194 U. S., at p. 96.)

It was decided that it did not. In other words, it was decided that a series of "entirely disconnected" and complete books (reprints of standard works which "no one would imagine for a moment * * * were periodicals and not books") does not become a periodical and entitled to admission as second class matter because such books are "issued at stated intervals under a collective name." (194 U. S., at p. 98.)

In point of law, what the court held, was simply that compliance with the conditions of Section 14, "although entitled to great weight in determining the character of the publications" (p. 98) is not conclusive as to the right of a publication to admission to the second class. The publication must not only comply with these requisites but must also be a periodical in the ordinary meaning of the term. That, the Riverside Literature Series plainly was not.

Houghton v. Payne, 194 U. S., 88.

III. The tests now set up by the Assistant Attorney-General are not within the ratio decidendi of Houghton v. Payne, but are additions to the requirements of the statute and therefore void.

We have now seen all that was adjudged and decided in Houghton v. Payne.

But the Post Office Department, for the purposes of this case, affects to discover in the opinion of this court and to set up five distinct tests of a periodical.

It is by these tests, they say, that complainants' publications are to be tried and by which they are condemned. These five tests which the Assistant Attorney-General for the Post Office Department says that this court has "laid down" are

1. "That it appears at stated intervals."

2. "That each number contained a variety of original articles,"

3. "That such articles be by different authors."

4. "That they be devoted either to general literature or some special branch of learning, or to a special class of subjects,"

5. "That each number be incomplete in itself to indicate a relation with prior or subsequent numbers of the series."

Opinion of Asst. Atty.-Gen., p. 5 (Exhibit).

The first of these so-called tests, it may be observed at the outset, is a mere repetition of one of the requirements of Section 14 of the Act of March 3, 1879, and there is no question about it.

The fourth, namely: "That they shall be devoted either to general literature or some special branch of learning or to a special class of subjects" (although it is a rather general paraphrase of the fourth condition of Section 14, of the Act of March 3, 1879, and, therefore, *if set up a test,* open to question as an unauthorized variation from the statute), is not involved in this case, and may be set on one side.

But three of these supposed tests are plainly restrictive additions to the requirements of the statute and practically equivalent to amended regulation

276, which has already been declared void. They are:

(2) "That each number contain a variety of original articles";

(3) "That such articles be by different authors";

(5) "That each number be incomplete in itself."

In the form of a regulation such as amended 276, these tests would be plainly void as in excess of the statute. Devised *ad hoc* for the purpose of excluding these particular periodicals, are they not equally void?

If we inquire where the authority for these additional tests is to be found we are told that they have been evolved from certain language used by Mr. Justice Brown in the course of his opinion in the case of Houghton v. Payne.

Now, no court has condemned more emphatically than this court the practice of slurring over the real point decided in a case for the purpose of hanging argument upon the phraseology of the opinion. As was said long ago by Mr. Chief Justice Marshall:

> *"The positive authority of a decision is co-extensive only with the facts on which it is made."*
>
> Ogden v. Saunders, 12 Wheat., 213, 233.

The decision of the precise point presented for decision, upon the facts actually before the court, is the Act of the court. That is authoritative. But this is not true of the language of the opinion, and the analogies, comparisons and examples, made use of by way of argument and illustration. These have no force of themselves and must be considered in

strict connection with the particular facts to which they relate and the point presented for decision.

> "The language of Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat., 264, 399, may profitably again be quoted: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "
>
> Pollock v. Farmers' Loan & Trust Co., 157 U. S., 574.

This maxim has been steadily adhered to and enforced by this court throughout its entire history.

Brooks v. Marbury, 11 Wheat., 28, 91.

Carroll v. Lessee of Carroll, 16 How., 275, 287.

Wis., etc., R. R. v. Price Co., 133 U. S., 496, 509.

Hans v. Louisiana, 134 U. S., 1, 20.

Cross v. Burke, 146 U. S., 82, 87.

Pollock v. Farmers L. & T. Co., 157 U. S., 429, 574.

U. S. v. Wong Kim Ark., 169 U. S., 649, 679.

Downes v. Bidwell, 182 U. S., 244, 259.

And the later utterances of the court are quite as emphatic as the first.

Harriman v. North. Sec. Co., 197 U. S., 244, 291.

The language used by Mr. Justice Brown, in Houghton v. Payne, respecting books and periodicals, then, is to be read in direct and immediate relation to the facts before him. He was intent upon emphasizing that the books in the Riverside Literature Series, "Each complete in itself and entirely disconnected with every other," were not a periodical. He says therefore by way of contrast, p. 97: "*Ordinarily* each number is incomplete in itself and indicates a relation with prior or subsequent numbers of the series." *Ordinarily*, observe, not uniformly or necessarily. For it is well known that there are numbers of periodicals such as *Short Stories, Trans-Atlantic Tales, The Smart Set, The Black Cat, Munsey's, Young's*, not to mention the *Postal Guide*, each number of which is necessarily complete in itself.

But what Mr. Justice Brown, having the *disconnected reprints* of the Literature Series in mind, uses as an illustration, the Assistant Attorney-General, and the Assistant Postmaster-General set up as a test. This is their test "No. 5. That each number be incomplete in itself." No periodical, they say, can be complete in itself. The Tip-Top Weekly therefore, is not a periodical, for each number is complete in itself—complete, that is, in the sense that the story is not broken off in the middle in one

number and "continued" in the next. The circumstance that it is also true of all the recognized periodicals above mentioned and many more is, in their view, of no importance.

Again Mr. Justice Brown says:

> "It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature."

But what kind of connection and what kind of literary continuity he had in mind is shown by the next sentence:

> "If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects."
>
> Houghton v. Payne, 194 U. S., 98.

There again, the language is addressed to the facts then before the court and so taken is apt and to the point. A number of exhibits were before the court to illustrate the logical consequence of permitting wholly disconnected books like those of the Literature Series to become periodicals by simply publishing them serially. Among these were the

Farm and Fireside Library, one number of which was "The New Cookbook," another "The Peerless Atlas of the World," another a "Horsebook," and so on.

This expression used in this particular relation is also seized on by the Post Office Department and erected into test. The language used to contrast the periodical of the most usual type with the Riverside Literature Series in which the successive numbers were each simply a distinct reprint of a separate work by a different author, connected with one another neither in authorship, subject-matter, nor sequence, is taken, for the purpose of this case, as equivalent to an adjudication that there can be no periodical if each story is complete in itself. Says the Assistant Attorney-General, "The question is, is each story complete in itself?" No matter what "connection there may be between the different numbers in the nature of the articles appearing in them," it does not avail, if each story is complete in itself.

But the reason expressly given by Mr. Justice Brown to show why one number cannot be devoted to one distinct subject-matter, the next to another, and the one following to a third, shows also that the remark was never meant to have any such far-fetched application as the Post Office Department gives it in this case.

> "It could scarcely be supposed," he says, "that ordinary readers would subscribe to a publication devoted to *such* an extensive range of subjects."
>
> Houghton v. Payne, 194 U. S., p. 98.

And, in fact, in the Houghton case there were no ordinary reading subscribers. But in this case the evidence shows that ordinary readers do subscribe to the publication. And they do subscribe because of a genuine continuity and connection, which the Assistant Attorney-General affects to ignore and deny.

> See list of individual subscribers offered (Rec., p. 63) as an *Exhibit*.

The testimony of several witnesses is to the same effect:

> "This line of stories is to a large extent one story divided into sections, each section being an issue of the weekly or occupying an issue of the weekly. Stratemayer (Rec., p. 105). * * *
>
> "From my knowledge, I should say that the demand for this was a steady weekly demand, the people buying one issue looking generally for the next."
>
> Stratemayer (Rec., p. 106).
>
> Ellis (Rec., p. 98).
>
> Spangler (Rec., pp. 63, 67).

Perhaps, if the Assistant Postmaster-General, before sending this case to the Assistant Attorney-General, had paused to inquire into such facts as these, or if the Assistant Attorney-General had heard the appellants before he decided, there might not have been any occasion for the filing of this bill.

Again, contrasting the magazine type of periodical with the admitted facts about the Riverside Literature Series, Mr. Justice Brown says:

> "A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects."

And on the other hand:

> "A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay, or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors."

No one knew better than Mr. Justice Brown that the original periodical, the thing which gave the word to the language, contained a single "essay by the same author," and each successive number contained a single essay by the same author, who was the author of the first. And when, in point of fact, it happened that the papers were written by different authors, that fact was concealed and the diversity of authorship hidden behind the fiction of an identity of authorship. There was no variety of articles by different authors at all.

Mr. Justice Brown had no intention, in penning these words, to exclude from the category of periodicals "in the ordinary meaning of the term" the *Spectator*, the *Tatler*, the *Guardian*, the *Rambler*, and a host of others which have made the word periodical illustrious.

He was simply contrasting, for the immediate purpose in hand, the books of the Literature Series, which "no one would imagine for a moment were a periodical," with the most usual type of periodical coming to our library tables—the monthly magazine. But the monthly magazine is not the only type of periodical. There are many others, some older and some newer, which are equally entitled to the name.

As has already been pointed out, the word periodical in "the ordinary meaning of the term" came into use with the type of publication in which each number did *not* contain a variety of original articles and in which the articles were *not* by different authors. Addison, it is well known, wrote the whole of the *Freeholder* without assistance. Each number contained a single article. Of the 635 numbers of the *Spectator* he wrote 274. The rest were written practically by Steele. Each number contained a single article. Johnson wrote the whole of the *Rambler* by himself (except five numbers), though it came out twice a week. Each number contained a single article. That type still flourishes in the form which is exemplified by the *Philistine*, a copy of which is in evidence as an exhibit. That it is by no means necessary that the articles in a periodical be by different authors is shown by another classic type of periodical, the great quarterly critical review. You will look in vain through a copy of the old *Edinburgh Review*, the *Quarterly Review*, or the *Foreign Quarterly Review*, for any indication that the articles are by different authors. True it is that the articles usually were by different authors, but that fact was not disclosed by the periodical, and, al-

though the contributors were often men in the first rank, the editors of those periodicals saw to it that a uniformity of attitude, tone and style should prevail throughout in order to create the impression of a continuous entity. What is said by Mr. Justice Brown is indeed applicable only to two *sub-types* of the periodical, the extinct *miscellany* and the *monthly magazine* which happens to have succeeded it in popular favor.

Notwithstanding all this, this short phrase of Mr. Justice Brown's is seized upon by the Post Office Department and converted into, not one, but two *tests* of a periodical, viz.:

> "(2) That each number contain a variety of original articles;
> "(3) That such articles be by different authors."

The testimony of the continuous literary history of the language establishes sufficiently, we think, that these tests have no basis in the "ordinary meaning of the term," which is the sole criterion of the statutes.

> "As the *Rambler* was entirely the work of one man, there was, of course, such a uniformity in its texture as very much to exclude the charm of variety; and the grave and often solemn cast of thinking which distinguished it from other periodical papers, made it, for some time, not generally liked."
>
> Boswell's Life of Johnson, Vol. 1, Chap. IX. [A. D. 1750, Ætat. 41.]

"The plan of the *Spectator* must be allowed to be both original and eminently happy. Every valuable essay in the series may be read with pleasure separately; yet the five or six hundred essays form a whole, and a whole which has the interest of a novel. * * * Addison is the *Spectator*. About three-sevenths of the work are his. * * * His best essays approach near to absolute perfection; nor is their excellence more wonderful than their variety. * * * On the Monday we have an allegory as lively as Lucian's Auction of Lives; on the Tuesday an eastern apologue as richly colored as the Tales of Scherezade; on the Wednesday a character described with the skill of La Bruyere; on the Thursday a scene from common life equal to the best chapters in the Vicar of Wakefield; on the Friday some sly Horatian pleasantries on the fashionable follies—on hoops, patches or puppet-shows; and on the Saturday a religious meditation which will bear a comparison with the finest passages in Massillon. * * * The number of copies daily distributed was at first three thousand. It subsequently increased, and had risen to nearly four thousand when the stamp tax was imposed. That tax was fatal to a crowd of journals."

Macaulay's Life and Writings of Addison.
[Critical and Hist. Essays, Vol. VI, pp. 123, 126.]

Goldsmith, in his prospectus or introduction to his periodical, the *Bee*, in which, as with Johnson in the *Rambler*, and Cumberland in the *Observer*, he was the sole writer, opens with these sentences:

"There is not, perhaps, a more whimsically dismal figure in nature than a man of real modesty who assumes an air of impudence; who, while his heart beats with anxiety, studies ease and affects good humor. In this situation, however, *a periodical writer* often finds himself upon his first attempt to address the public in form."

And, in regard to continuity of subject-matter, he thus addresses the prospective readers:

"I would not have him, upon the perusal of a single page, pronounce me incorrigible; he may try a second, which, *as there is a studied difference in subject and style*, may be more suited to his taste; if this also fails, I must refer him to a third, or even to a fourth, in case of extremity. If he should still continue refractory, and find me dull to the last, I must inform him, with Bayes in 'The Rehearsal,' that I think him a very odd kind of a fellow, and desire no more of his acquaintance."

"Those who attempt periodical essays seem to be often stopped in the beginning by the difficulty of finding a proper title. Two writers, since the time of the *Spectator*, have assumed his name, without any pretensions to lawful inheritance; an effort was once made to revive the *Tatler*, and the strange appellations by which other papers have been called, show that the authors were distressed, like the natives of America, who came to the Europeans to beg a name. * * * What is to be expected from this paper, *whether it will be uniform or va-*

rious, learned or familiar, serious or gay, political or moral, *continued or interrupted*, it is hoped no reader will inquire." (Johnson's prospectus for the *Idler*.)

Are Boswell and Macaulay and Johnson and Goldsmith inferior authorities to Messrs. Lawshe and Bacon, upon the question of the ordinary meaning of the term *periodical?* Is Congress, upon this question of law, to be presumed to have intended the meaning of that term as known to the literature of our language, or is a meaning to be given to it, thirty years after the passage of the statute, by a new Third Assistant Postmaster-General and his assistants?

But we have the testimony, and that the testimony of action, by the Post Office Department itself, upon the subject. Just as the list of publications, complete in themselves, which the Postmaster-General accepts as periodicals, shows that self-completeness is not and cannot be a test of a periodical, so in like manner the long list of other publications containing no "variety of original articles by different authors," shows that that requirement is not and cannot be a test of a periodical. Take, for instance, the list of religious periodicals offered in evidence as exhibits at page 69 of the Record. The "*Little Pilgrim Lesson Pictures*," for example, consists of thirteen cards, one for each week, forming one quarterly part of a periodical devoted to religious instruction. Each of these cards has upon it a picture of some biblical event, and a text from the same

source. The article, if the content of the periodical can be called "an article," is neither original nor has it any variety. To such a publication as that the casual language of Mr. Justice Brown can have no application. It does not conform to the Department's test. Yet it is a periodical.

Take the Advance Sheets of the U. S. *Supreme Court Reports.* It would seem rather extraordinary to designate the decisions of this court, reported in the order in which they are rendered, a variety of original articles by different authors. If these reports constitute a periodical, as the Post Office Department says they do, the language of Mr. Justice Brown is no "test."

Take again, for example, the "*Official Guide of the Railways, Steam or Navigation Lines of the United States,*" once ruled by the Post Office Department not to be a periodical, but restored to that class by the *mandamus* of the Court of Appeals. Where is the variety of articles by different authors?

What shall we say then of the United States Official Postal Guide? A distinction is, indeed, sought to be drawn by the Assistant Attorney-General,

> "between publications claiming the second class privilege on the ground that they are devoted to literature, and those claiming privilege by reason of the fact that they are publications for the dissemination of information of a public character. The requirement of the one class will not fit the needs of the others."
>
> Opin. Asst. Atty.-Gen. P. O. D., p. 8. (Exhibit.)

But the statute draws no such distinction, and there is in the law but one set of requirements for all classes of periodicals. If variety of subject-matter (the lack of which was actually urged against the Railway Guide until its status was judicially determined) is an essential characteristic and test of a periodical, it must be an essential characteristic and test of all periodicals. If diversity of authorship is an essential characteristic and test of a periodical, it must be an essential characteristic and test of all periodicals. That such is not the case proves that they are not essential characteristics and valid tests. If, on the other hand, as we have pointed out, what was said by this court about variety, etc., was simply by way of comparison and illustration, then the Post Office Department puts itself outside the law when it raises such casual remarks to the level of a statutory definition.

But the invalid distinction made by the Post Office Department between classes of periodicals is itself a mere afterthought and evasion. Take the *Burr McIntosh Monthly*, offered as an exhibit (Rec., p. 71). That is not within that fortunate class of publications which claim the privilege as disseminators of information of public character and are, therefore, exempt, as the Assistant Attorney-General holds, from all these requirements and tests which the other class is subject to. It belongs to the same unfortunate class as ours, namely, those devoted to literature, etc. Yet how does it comply with the tests set up by the Assistant Attorney-General? It is

complete in itself, and it has no variety of original articles by different authors.

Take again, "*Masters in Art*," also an exhibit (Rec., p. 71). Here is a publication which purports on its face to be a series of illustrated *monographs*, each devoted to a single artist, one of the great dead. Here there is neither any variety-of-original-articles-by-different authors nor any incompleteness-in-itself; neither does one number indicate "a relation with prior or subsequent numbers of the series" other than that they are all devoted to Masters in Art.

It would be tedious to prolong the discussion by an examination of further illustrations. Enough has been said, we think, to show that the tests set up by the Assistant Attorney-General are not involved in the ordinary meaning of the word "periodical," and that there is nothing in the case from which those tests purport to be drawn, namely, *Houghton v. Payne*, to show that the publication in question here falls within *what was decided there*.

Which, in truth, does our publication more nearly resemble, the Riverside Literature Series, or the publications mentioned above which have been either adjudged to be periodicals or are accepted as such by the Post Office Department?

(1) The *Riverside Literature Series* was a reprint. The contents of each number of *The Tip-Top Weekly* is original.

(2) The stories in the *Tip-Top Weekly* are fresh and current and written for it from number to num-

ber. The contents of the Literature Series were written anywhere from twenty to two thousand years ago, and without relation to the *Riverside Literature Series.*

(3) The stories appearing in the *Tip-Top Weekly* are written in response to a current periodical demand. There is no periodicity whatever about the Riverside Literature Series.

(4) There is no demand for the back numbers of the *Tip-Top Weekly* "which are practically valueless and dead matter, so to speak, in so far as the mailing privilege is concerned." (22 App. D. C., p. 248.) But "No. 1 of the Riverside Literature Series, first issued in 1866, is as much alive, and possibly more than the latest number of 1902 or 1903."

(5) The issues of the Literature Series are "entirely disconnected." No. 140, *Henry Esmond*, by W. M. Thackeray, is entirely disconnected from No. 141, *Three Outdoor Papers*, by T. W. Higgins. No. 142, *Sesame and Lilies*, by John Ruskin, is entirely disconnected from No. 141 and from No. 143, Plutarch's *Alexander the Great*, done into English (some three hundred years ago) by Sir Thomas North.

The successive numbers of the *Tip Top Weekly*, on the other hand, are written by the same author, deal with the same group or knot of characters, and are linked together in the usual way of fiction, by a sequence of events.

IV. The exclusion of complainant's periodicals is not based upon any settled, definite or uniform construction of the Statute; but arbitrarily discriminates between publications essentially similar and deprives the complainants of the equal protection of the laws.

Is the Postmaster-General really acting upon any definite and settled construction of the statute?

If, in fact, in dealing with this publication, he has acted upon a construction of the statute or a legal definition of the term "periodical publication" as used therein, it is obvious that such construction ought to be found to be, not a construction *ad hoc*, but a construction susceptible of general application and in point of fact generally and uniformly applied. As said by the Postmaster-General in urging the enactment of the bill (H. R. 3850), which became the Act of March 3, 1879, it was intended to provide for "a uniform construction" of the law (Rec., 73). It ought also to be a construction which, in the nature of things, is susceptible of intelligible statement, and, in fact, definitely and certainly stated. If, in fact, we find that it is not generally applied, that some publications conforming to it are excluded, while others clearly violating it are admitted, that the elements of the definition are considered or ignored at will, then we may rationally conclude that there is no such general construction and that the grounds now assigned for the exclusion of complainants' periodicals are afterthoughts and pretexts invented to excuse this particular act.

The exhibits offered in evidence and already commented upon, show that the construction of the statute invoked against complainants' publication is not generally or uniformly applied. They show, in fact, that while it is excluded as not answering certain tests, others distinctly violative of those tests are accepted. They show that the various elements of the supposed definition are considered or ignored at will. In truth, the Post Office Department, in its efforts to strike down this publication, formulates, after the hearing, in a document never communicated until the exclusion has already been accomplished, an imaginary distinction between the requirements of law as to different classes of periodicals, a distinction not to be found anywhere in the statutes. The exclusion of the publication is simply an arbitrary act of power.

Let us remember that the transportation of the mail is as completely a monopoly as can readily be conceived, and is so universal in its application that, as this Court has said, "it really operates as a popular and efficient method of taxation." Considering this we can readily perceive that such a discrimination as is here sought to be made by mere administrative officers between things substantially alike, would be even beyond the power of Congress itself.

For that reason it was taken for granted by this Court in the case just quoted from:

> "That Congress would have no right to extend to one the benefit of the postal service and deny to another person in the same class and standing in the same relation to the Government."
>
> Public Clearing House vs. Coyne, 194 U. S., 497, 507.

Or, as it was put by Mr. Attorney-General Bonaparte in a recent opinion:

> "The provisions of these sections are merely illustrative of the principles underlying the statutes which regulate our postal service; namely, that this service exists for the whole people and that its advantages must be extended impartially to all qualified to avail themselves of such advantages."
>
> 27 Op. Atty.-Gen., p. 53.

No more unjust and illegal discrimination can be conceived than to tax one citizen for transporting his mail matter *seven hundred per cent* more than other citizens are taxed for the same matter. But such is the effect of the exclusion of a periodical from the second class.

To compel the publisher to ruin himself by paying this enormous addional burden, or to go out of business, is to deprive him of his property without due process of law.

FOURTH POINT.

The Postmaster-General has no power, by misconstruction of law, to take away from the individual citizen his positive legal right to have his mail matter transported at the rate fixed by statute.

Such mistake of law does not bind the courts or preclude their granting relief.

The last stand of the Post Office Department is found in this contention, namely, that, although it may be wrong in excluding complainants' publica-

tion, it did so in the exercise of a discretion that cannot be reviewed.

This claim of immunity is always brought forward whenever complaint is made of a wrongful use of power by officials of the postal service to the detriment of the individual citizen. Though repeatedly urged it has never met with the assent of any court.

That the officials of the Post Office Department may not with impunity misconstrue the postal statutes to the loss or injury of individual citizens has been the settled law of the courts since the beginning of a postal system. It is evidenced by adjudged cases as far back as the reports of *Cowper*, *Burrows* and *Wm. Blackstone*. And it has been followed undeviatingly down to the last decision in this court.

I. **The right of a citizen to post his mail matter at the rates established by Congress is a fixed legal right which he cannot be deprived of by the act of an administrative officer.**

It is Congress, and not the Postmaster-General, who fixes the classification and the rates.

> "It is very clear that the Congress of the United States has not committed to the Postmaster-General, or to any one else, the matter of determining what should be carried in the mails as second class matter, and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster-General to add anything to the statute or to take anything from it."
>
> Payne v. Railway Pub. Co., 20 App. D. C., 597.

The citizen has a positive legal right to have his mail carried at the rate so fixed by Congress. In short, he has a legal right to the statutory rate.

Ib., p. 598.

Congress having classified the matter and fixed the rate, it is the duty of the Postmaster-General to charge, upon the thing described, the rate prescribed. He has no power to depart in any respect from the statutory command or charge a penny more than the given matter is charged with by the statute.

If he does, the citizen's right to the statutory rate will be protected and enforced by legal process.

As already stated, there is nothing novel about this proposition.

In 1774, it was held that a Postmaster demanding postage in excess of the lawful rate fixed by statute and refusing to deliver at the addressee's place of abode without additional charge could be sued and recovered against by the addressee in an action for money had and received.

Smith vs. Powditch, 1 Cowper, 182.
Stock vs. Harris, 5 Burrows, 2711.

Previously, in 1773, a deputy Postmaster affected to construe the term "delivery" as meaning delivery at the Post Office window. He was sued in case by the aggrieved party for detaining his letters by refusing to deliver personally within the post-town, and the plaintiff again recovered.

Rowning vs. Goodchild, 2 Wm. Black., 907-910.

Although the Act of Parliament was doubtful and the usages of various places with respect to the meaning to be given to the word "delivery" was contrary, the court did not hesitate to construe the statute for itself and to hold the Postmaster liable for attempting, as it was said, to raise a tax upon the public in the teeth of the act of Parliament.

See also Barnes vs. Foley [1768], 4 Burrows, 2149.

Jones vs. Walker [1777], 2 Cowper, 624, 626, 627.

In the latter case, the question was as to the meaning of the "suburbs" of the city of London. "That," said Lord Mansfield, "is a question of construction upon the act of Parliament." And he proceeded to construe it adversely to the claim of the Postmaster.

Coming to our own country, we have, arising in 1846, the case of Teal vs. Felton, 12 How., 284. Congress had provided, in the act regulating the classification of mail, that "any writing or memorandum" made on "a newspaper, pamphlet or magazine" should render it subject to single-letter postage. The Postmaster-General, purporting to act in pursuance of this statute and according to his construction of it, issued a regulation in the form of a circular instructing Postmasters not to deliver, except at letter postage, any newspaper, etc., "found to contain any manuscript or memorandum of any kind, either written or stamped, or by *mark* or *sign* made in any way." A Postmaster, finding a letter or initial upon

the wrapper of a newspaper, distinct from the direction, refused, in pursuance of this regulation, to deliver it, unless the addressee should pay letter postage. The addressee, thereupon, sued him in trover. The case coming to this Court, no difficulty was found in putting a *quietus* on the Postmaster-General's construction of "writing or memorandum":

> "The act forbids a memorandum in the 13th section: and in the 30th, providing for a penalty, the terms are, 'any writing or memorandum,' but in neither are found the terms 'marks or signs' as used in the circular. No provision is made for such a case.
>
> "A single letter or initial upon the wrapper of a newspaper, is neither a memorandum nor a writing, in the sense in which either of those terms are ordinarily used, or as we think they were intended to be used, in the 30th section of the act."
>
> "This view of the law disposes also of that point in the argument, claiming for the postmaster an exemption from the suit of the plaintiff, upon the ground that he was called upon, in the act which he did, to exercise discretion and judgment. In Kendall v. Stokes, 3 How., 97, 98, will be found this court's exposition upon that subject, with the leading authorities in support of it. The difference between the two must at all times be determined by the law under which an officer is called upon to act, and by the *character of the act. It is the law which gives the justification*, and nothing less than the law can give irresponsibility to the officer, al-

> though he may be acting in good faith under the instructions of his superior of the department to which he belongs. *Here the instructions exceed the law,* as marks and signs of themselves, without some knowledge of their meaning, and the intention in the use of them, are, as we have said, neither memoranda nor writings. Tracy v. Swartout, 10 Pet., 80."
>
> Teal v. Felton, 12 How., pp. 284, 291.

In Am. School of Magnetic Healing v. McAnnulty, 187 U. S., 94, the Postmaster-General, purporting to construe and enforce the statutes denying the use of the mails to persons engaged in conducting a "scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations and promises," held that the undertaking of the School of Magnetic Healing to cure diseases by mental treatment was a false and fraudulent pretense within the meaning of the statutes mentioned. A fraud order was therefore issued forbidding the delivery of mail matter to them. But this Court held that, upon the admitted facts, the practice of magnetic healing could not be construed, as the Postmaster-General had construed it, to constitute a fraud or false pretense or promise within the meaning of the statutes.

> "The statutes in question were not intended to cover a case of what the Postmaster-General might think to be false opinions but only cases of actual fraud in fact."
>
> Id., 107.

"The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses, or promises, as that phrase is generally understood, and, as in our opinion, it is used in the statutes."

Id., 107.

With respect to the claim that the action of the Postmaster-General was in the exercise of a discretion, and, therefore, not subject to review, the Court asked:

"Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster-General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?"

The question was answered thus:

"That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by an action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law,

and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Burfenning v. Chicago, etc., Railway Co., 163 U. S., 321; Johnson v. Drew, 171 U. S., 93, 99; Gardner v. Bonstell, 180 U. S., 362.

While the analogy between the above cited cases and the one now before us is not perfect, yet even in them it is held that the *decisions of the officers of the department upon questions of law do not conclude the courts*, and they have power to grant relief to an individual aggrieved by an *erroneous decision of a legal question by department officers.*"

Id., 108.

"The Postmaster-General's order being the result of a mistaken view of the law could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. * * *

Although the Postmaster-General had jurisdiction over the subject-matter (assuming the validity of the acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, *yet such decision being a legal error does not bind the courts.*"

Id., 110-11.

In Payne v. Railway Publishing Co., 20 App. D. C., 581, the Postmaster-General, purporting to execute and apply the Act of March 3, 1879 (which is the statute in question here), formulated and issued a new postal regulation order, saying that periodical publications referred to in the act "*are held* not to include those having the characteristics of books but only such as consist of current news or miscellaneous literary matter or both." The Supreme Court of the District and the Court of Appeals adjudged that the regulation thus construing the terms of the statute "is clearly in excess of the statute" and "prescribes conditions which the statute does not prescribe" (Rec., p. 598). The exclusion of the relator's periodical, the well-known Railway Guide, being based exclusively and in express terms upon its failure to comply with the super-added requirements of the postal regulation, the ground of exclusion was held "insufficient in law" and the publication was restored to the second class.

Payne v. Nat. Ry. Pub. Co., 20 App. D. C., 581.

See also U. S. *ex rel.* Nat. Ry. Pub. Co. v. Payne, 30 W. L. R., 338.

While these decisions are all based on a principle of general application, namely, that administrative officers have no power to bind the courts by mistake of law, its special applicability to postage cases will be seen if we consider, for a moment, the real nature of the Postal Service.

While the Post Office Department is an office of the Federal Government, exercising a public function, its business, after all, is the transportation for the public of certain forms of matter—letters, circulars, newspapers, periodicals, books and even merchandise—at certain definite rates fixed by law. The citizen has a legal right to have that matter transported at that rate.

> "The citizen who desires to have his publication carried in the mails of the United States as second class mail matter, and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus, if the Postmaster-General arbitrarily or without valid legal reason refuses to receive and transmit such publication. Of course the Postmaster-General and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."
>
> Payne v. Railway Publishing Co., 20 App. D. C., pp. 581, 598.

In so far as Congress has provided for the carriage of the prescribed matter, the postal service is, in essence, simply a common carrier invested with a monopoly—a monopoly which renders all the more

necessary a just and equal administration and application of the Congressional rates.*

The Post Office Department is not, in strictness, a political department.

> "It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defense of the Government against insurrection and foreign invasion, and the administration of public justice are."
>
> Public Clearing House v. Coyne, 194 U. S., pp. 497, 506.

There is an obvious distinction between the State acting in the exercise of its sovereign political authority over its citizens, and the State acting simply as the administrator of a public service. In the latter aspect, the Government is simply "engaged in business dealings with its citizens." Consider, if this were not true, the situation of the citizen, should the Government ultimately take over (as seems not so unlikely) the control of the telegraph and the interstate railways. The application of the rates fixed by law is no discretionary matter to be decided upon

*NOTE.—Although, in respect of second-class matter, the Postal Service has not the same legal monopoly as in respect of first-class matter, the effect of a wrongful classification is the same as if it had. The only other channels for the transportation of such matter, the express companies, follow the postal classification, and refuse newspaper and periodical rates to "all publications not registered in the United States Post Office as second class matter." *Vide* Report Comm. Second Class matter, 1912, pp. 91, 92. Exclusion from the second class means the death of the periodical.

considerations of expediency. Given the facts the statute applies itself.

Any discretion therefore which may remain to the officials of the postal service in the classification of the mail, is not analogous in any way to the political discretion lodged in the head of the political department as such. As was said by the Court of Appeals, "Their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."

> Payne v. Railway Publishing Co., 20 App. pp. 581, 598.

While there may be discretion to determine upon proper evidence and in the proper way the facts to which the law is to be applied, a purely administrative officer, such as is the Postmaster-General, in the application of the law to the facts, cannot violate the statutory right of the citizen by misconstruing the law and then insist that the mistake of law made by himself is binding on the courts and precludes their granting relief.

II. Law or fact.

Now it is manifest that in declaring this publication not to be a periodical publication but a book, the Postmaster-General must be either determining a question of fact or announcing a conclusion of law. The Postmaster-General himself does not seem altogether certain which it is. Sometimes he would seem to assert distinctly that it is the latter.

But having his eye on the general principle that findings of *fact* by administrative officers, when not *unsupported* by the evidence, are not subject to review, he says in his answer, however, that in deciding that the publication was not a periodical the Third Assistant Postmaster-General considered "not only copies of the successive numbers of the publication by comparison with the requirements of the Act of March 3, 1879, but also all other evidence and facts material to such inquiry."

Ans., Par. XV (Rec., pp. 19-20).

But when we inquire, "what were those facts and how did you learn them," it appears that the only facts, beyond the numbers of the publication itself, were certain supposed facts recited in the opinion of the Assistant Attorney-General which were never disclosed to the complainants and which they had no opportunity either to discuss or to disprove. *If the judgment of exclusion rests upon that ground, and it is expressly so grounded in part at least, it is clearly void.*

But in so far as the judgment rests simply upon a comparison of the publications themselves with the requirements of the statute, that is a question of law.

Bates & Guild Co. v. Payne, 194 U. S., 106, 107, 110.

The court below, while it held against us, conceded that it was a question of law.

While there may be a discretion in an administrative officer to determine the existence and weight

of matters of fact, upon which his judgment may depend (all requirements as to hearing being, of course, complied with) there is no discretion to misconstrue the terms of a statute or to amend it by reading into it limitations not already there.

Payne v. Ry. Pub. Co., 20 App. D. C., 581, 597, 599.
Morrill v. Jones, 106 U. S., 466, 467.
Teal v. Felton, 12 How., 284, 291.
Am. S. Mag. Heal. v. McAnnulty, 187 U. S., 109.
Sandford v. Sandford, 139 U. S., 642, 647.
Quinby v. Conlan, 104 U. S., 420, 426.
Moore v. Robbins, 96 U. S., 530, 535.
Shepley v. Cowan, 91 U. S., 330, 340.
Johnson v. Towsley, 13 Wall., 72.
Silver v. Ladd, 7 Wall., 217.

We have already shown, we think, in the second division of this brief, that the exclusion of the appellees' publication is not supported by anything in the Act of 1879, and that the Department, in order to accomplish it, has in fact amended the Act by reading into it at least three distinct additional limitations not to be found there.

And, curiously enough, the right to do that very thing is claimed for the Postmaster-General by the Assistant Attorney-General for the Post Office Department in his opinion, page 6, in these words: "The statute says that periodicals as contra-distinguished from books shall be entitled to the second class privilege, and as it fails to specify fully the

requisite of a periodical, *the determination of what constitutes such* is clearly a matter within the *judgment* or *discretion* of the Postmaster-General and his Assistants, and is not the adding of a burden additional to those imposed by the statute."

Opinion of Assistant Attorney-General, July 11, 1907 (Exhibit).

And by discretion he means a final and conclusive discretion that "would not be reviewed or disturbed by the courts."

Ibid., p. 21.

Mark, he distinctly claims not a discretion to determine issues of fact, but a conclusive, unreviewable discretion to say what the statute means—what shall "*constitute such.*"

A more complete and palpable misunderstanding of the province of the Postmaster-General could hardly be conceived. It is Congress and not the Postmaster-General who determines what shall constitute second class matter and what third class matter.

Payne v. Ry. Pub. Co., 20 App. D. C., 597.

The Postmaster-General has no general discretion to determine what shall constitute a periodical. He has only the discretion, *Congress having determined the tests of what shall constitute a periodical*, to inquire whether a particular piece of mail matter complies with those statutory tests.

According to the claim made by the Government in this case, the Third Assistant Postmaster-General, having "the judgment or discretion" to determine "what constitutes a periodical" could determine to-morrow that *The Century* or *Scribner's* is not a periodical, and *The Century* or *Scribner's* would have to bow in complete and final submission to that decision.

If the decision is dependent upon "extraneous information obtained by him," then, subject always to the requirement of an actual hearing in respect of such information, he has a discretion in respect of such extraneous matter. But where he has disabled himself from using such extraneous matter, or there is none, and the facts are not in dispute, he has no discretion to mistake the meaning of the statute or bind anybody by such mistake.

The citizen and the court are both entitled to require the administrative officer to state the rule of law which he is acting on in order to compare that rule with the statute on which it purports to be based.

Am. Sch. of Mag. Heal. v. McAnnulty, 187 U. S., 109.

If not in conformity with the statute, upon which it purports to be based, it is void.

It is no answer to say, that in arriving at the rule, the administrative officer has to read the statute to find out what it means and, therefore, exercises a discretion which cannot be controlled.

As has been pointed out repeatedly by this

court, the mere fact that any officer must read the law and therefore, in a certain sense, construe it, in order to form a judgment from its language as to the duty it directs, does not give the officer a discretion to read the statute as he pleases.

Roberts v. U. S., 176 U. S., 221, 231.
U. S. *ex rel.* v. West, 19 App. D. C., 333.
Payne v. Ry. Pub. Co., 20 App. D. C., 581, 597.
Garfield v. Greasby, 211 U. S., 249, 261, 262.

For as stated by this court in the Roberts case just cited "*Every* statute to some extent requires construction by the public officer whose duties may be defined therein. * * * *Every* executive officer whose duty is plainly devolved upon him by a statute might refuse to perform such duty and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of the statute by him."

III. The definition of a word of common speech used as a statutory term is a pure question of law.

It being true, then, that there exists, in general, no uncontrollable discretion to miscontrue a statute, *a fortiori*, can there be no such discretion when the construction is simply the process of defining a statutory term. The definition of statutory terms is a question of pure law.

This proposition is so elementary that it seems a trespass upon the court's patience to cite authori-

ties in its support. There is no end to the cases of judicial construction of statutory words, in every branch of the law.

McCulloch v. Md., 4 Wheat., 316, 413, 415, 418.
State v. Stevens, 69 Vt., 411, 413.
Taylor v. Horst, 52 Minn., 300, 303.

For instance, whether or not a definitely described game falls within the prohibition of a statute against lotteries is a question of law.

Com. v. Sullivan, 146 Mass., 142, 145.

Especially is this true when the word, *as is the case here*, is used in its ordinary sense. In determining that iron ore was within the term "mineral and bituminous substances in a crude state," said the Supreme Court, "they are the words of common speech, and as such, their interpretation is within the judicial knowledge, and, therefore, matter of law."

Marvel v. Merritt, 116 U. S., 11, 12.

But the Assistant Attorney-General for the Post Office Department seems to be of a different opinion. Referring to the Houghton case, he says:

> "But the court did say that the statute 'does not define a periodical and while Section 14 lays down certain requisites' it does not declare that they are the only requisites, thus intimating that the Postmaster-General may define a periodical—that is, determine what *shall be the full requisites*, of a second class publication of this character."
>
> Op., Asst. Atty. Gen., of July 11, 1907 (Exhibit).

And, accordingly, he proceeds to set up the non-statutory "tests" by which he ruled this publication out.

It was precisely upon this theory of an uncontrolled discretion to define statuory terms—to determine *full requisites* not in the statute—that the Postmaster-General proceeded in amended regulation 276, which was struck down by the Court of Appeals in Payne v. Ry. Pub. Co., as being in excess of the statute. The definition runs thus:

> "'Sec. 276. General Definition.—Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year, and are within the conditions named in Sections 12 and 14 (Act of March 3, 1879, Sec. 10, 20 Stat., 359). The sections referred to are 293 and 277. Second class matter above described is of two kinds: 1. That sent by publishers or news agents. (Sec. 299.) 2. That sent by others than publishers or news agents. (Sec. 302.) Periodical publications herein referred to are held *not to include* those having the *characteristics of books, but only* such as consist of *current* news or *miscellaneous literary matter*, or both (not including advertising), *and conform* to the statutory characteristics of second class matter.'
>
> (Signed) C. EMORY SMITH,
> *Postmaster-General.*"

Although that regulation was declared wholly void by the Court of Appeals in December, 1902, it would seem, from the Third Assistant's statement about

the "initial origin" of his action (Rec., pp. 150, 152), the opinion of the Attorney-General, and the answer of the appellee that the present officers of the Post Office Department do not altogether acquiesce in that decision, but feel at liberty, whenever they see fit, to enforce its definition in substance though not in terms, as, in truth, it was enforced against these publications.

We respectfully submit that the decrees appealed from should be reversed, with direction to grant the prayers of the bills for an injunction against the enforcement of the orders of exclusion of July 26, 1907.

J. J. DARLINGTON,
H. H. GLASSIE,
Solicitors for Appellants.

MAY 14 1912
JAMES H. McKENNEY,

No. 250. 31.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLANTS,

v.

FRANK H. HITCHCOCK, POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT, BRIEF, AND ARGUMENT FOR APPELLEE.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912

SUBJECT INDEX AND CASES CITED.

STATEMENT OF THE CASE.....

THE NOTICE GIVEN AND THE HEARING ACCORDED THE COMPLAINANTS FULFILLED THE REQUIREMENTS OF THE LAW.....

Japanese Immigrant Case, 189 U. S. 86.....

Murray's Lessee *v.* Hoboken, etc., Co., 18 How. 272.....

Reetz *v.* Michigan, 188 U. S. 505.....

THE PUBLICATION IN QUESTION IS A BOOK AND NOT A PERIODICAL UNDER THE CLASSIFICATION OF THE POSTAL LAWS.....

Bates and Guild Co. *v.* Payne, 194 U. S. 106.....

Houghton *v.* Payne, 194 U. S. 88.....

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora A. Gould, trading under the firm name of Street and Smith, appellants,

v.

FRANK H. HITCHCOCK, POSTMASTER GENERAL of the United States.

No. 250.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT, BRIEF, AND ARGUMENT FOR APPELLEE.

The suit

is in equity and was brought in the Supreme Court of the District of Columbia by the appellants, who are publishers doing business at New York City, N. Y., against the Postmaster General of the United States to enjoin him from revoking the order previously made admitting to the mails as second-class matter a publication known as the "Tip Top Weekly," and to require him to receive the publication and

transmit it through the mails as second-class matter and at second-class rates (R. 1, 2, 3, 8).

An order of revocation had been issued, but this is alleged to be void (1) as having been done without granting a hearing to the parties interested, and (2) as being upon the merits manifestly against the law (R. 5, 6).

The complainants allege that the publication was devoted to "juvenile fiction of literary merit;" that this "literature is pure and wholesome in tone and so far as it deals with adventure deals with it in the same way and in the same spirit that it is dealt with by the recognized masters of juvenile fiction" (R. 7). This was denied in the answer, and the counter allegation was made that the issues of the publication, "while not impure in the sense of being indecent and immoral, are nevertheless unwholesome and positively harmful in their influence upon the class of readers to which they are addressed almost exclusively, to wit, boys of tender age and immature minds" (R. 22). Some of the testimony of O. G. Smith and Sinclair Tousey, and all of that of Edward S. Ellis, Edward J. Stratemeyer, and John Cotton Dana, on behalf of the complainants, relates to this issue. The testimony of Zed H. Copp was offered by the Government to sustain its contention as to the hurtful quality of the literature.

The discussion in this testimony of the comparative merits of different writers may be interesting, as is the view of "Oliver Twist," developed on the cross-

examination of Mr. Copp (R. 144). Counsel for the appellants asserts, and the Government witness assents, that "Oliver Twist was a common thief and associated with thieves." We had shared the general opinion that while Oliver was unfortunately compelled to association with evil characters for a time, he escaped contamination and was guilty of nothing more heinous than engaging in a conspiracy, while in the poorhouse, to ask for more of a soup so thin that too much or even enough was impossible. However this may be, the averments of the pleadings and the testimony on both sides as to the literary tone and moral quality of the "Tip Top Weekly" were immaterial. The Postmaster General was not proposing to exclude it from the mail, but was proposing only to classify it and fix the rate of postage at which it should pass in the mail.

The case presents two questions, and only two, the first as to the hearing, and the second as to the nature of the publication.

PROPOSITIONS AND AUTHORITIES.

I.

The notice given and the hearing accorded the complainants fulfilled the requirements of the law.

Murray's Lessee v. *Hoboken, etc., Co.*, 18 How. 272.

Reetz v. *Michigan*, 188 U. S. 505.

The Japanese Immigrant Case, 189 U. S. 86.

II.

The issues of "Tip Top Weekly" are books and not periodicals.

Houghton v. *Payne*, 194 U. S. 88.
Bates & Guild Co. v. *Payne*, *ibid.*, 106.

ARGUMENT.

I.

Were the complainants accorded a hearing as provided by law? The post-office appropriation bill of March 3, 1901, 31 Stat. 1099, 1107, requires that—

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

It is conceded that the "Tip Top Weekly" had been accorded second-class mail privileges and that by the order here in question these were taken away. Was this done without granting a hearing to the parties interested?

The classification of mails is manifestly an administrative act, and the hearing provided for when it is proposed to withdraw second-class privileges is a hearing of a kind appropriate to the proper discharge of administrative functions. The hearing was to be by the department and not by a court. It required notice and opportunity to present evidence and argument, but it did not require all the formalities of judicial procedure. That legal questions were to be determined does not alter the case. "It not infrequently happens that a full discharge of their duties

compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process." *Reetz* v. *Michigan*, 188 U. S. 505, l. c. 507. The principle is stated to be in *The Japanese Immigrant Case*, 189 U. S. 86, l. c. 101, and here liberty was involved, "that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act."

In this case the question is really one of fact. There is some, but not great, conflict in the testimony. If the testimony of the witnesses for the Government is accepted there was proper notice, and not only opportunity for hearing, but a full hearing given.

The notice speaks for itself. It is as follows (R. 9–10):

> POST OFFICE DEPARTMENT,
> THIRD ASSISTANT POSTMASTER GENERAL,
> DIVISION OF CLASSIFICATION,
> *Washington, May 17, 1907.*
>
> *Publishers of the Tip Top Weekly,*
> *New York, N. Y.*
>
> SIRS: You are hereby notified that, in accordance with the act of Congress approved March 3, 1901 (ch. 851, 31 Stats. at L., 1107),

you will be granted a hearing at the office of the Third Assistant Postmaster General, Washington, D. C., at 2 p. m., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip Top Weekly to the second class of mail matter under the act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, upon the following ground:

That the issues of the Tip Top Weekly do not constitute a newspaper or other periodical publication as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879, (ch. 180, 1 Supp. R. S., p. 246), governing "mailable matter of the second class," but are in fact books, which, under section 17 of said act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Your answer, in writing, must be submitted on or before June 11, 1907.

Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

A. L. LAWSHE.

This states the issue to be heard and determined, viz: Are the numbers of "Tip Top Weekly" periodicals or books?

And this issue was, as all concerned knew, determinable by the contents of the publication. There was

no question that the "Tip Top Weekly" was issued regularly at stated intervals, as frequently as four times a year, and bore a date of issue, and was numbered consecutively. There was no question that it was issued from a known office of publication, and none that it was formed of printed paper sheets, without board, cloth, leather, or other substantial binding. There was no contention by anyone that the publication was designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates. Obviously the question was of a like nature with that decided in *Houghton* v. *Payne*, 194 U. S. 88.

So the notice was very explicit. It called attention to the precise question the department was considering. It did not set forth the views of the department as to the question, nor is that the function of such a notice.

The complainants responded to the notice. The hearing was set for 2 p. m. June 11, 1907. On that day, or the day before, Mr. Heines appeared in the department as the representative of the complainants and another publisher, Frank Tousey, the latter having been cited to appear on the 12th of June. He left copies of a brief he had prepared, one for each case in which he was appearing. These briefs came to Mr. H. M. Bacon, superintendent of the Classification Division.

Mr. Heines appeared again on the 11th of June, and there is some controversy as to what occurred at this last appearance.

Jackson A. Due, secretary to the Third Assistant Postmaster General, testified that when Mr. Heines called, Mr. Lawshe, the Third Assistant Postmaster General, was engaged, and directed that Mr. Heines be taken to Mr. Bacon, and if, after going over the matter with him, he wanted to see Mr. Lawshe, he could come back. Mr. Due informed Mr. Heines of this and sent him down to see Mr. Bacon, and also informed Mr. Bacon by telephone that he had sent Mr. Heines down to him (R. 130).

Certain it is that Mr. Heines went to see Mr. Bacon, and as to this meeting Mr. Bacon testifies (R. 123):

> Q. When Mr. Heines handed you these briefs in the different cases did he say anything to you?—A. Nothing, except I stated to him, upon his calling, either the following day or later in that day, that I had looked over the briefs and it appeared that he had covered the cases very fully. I asked him whether or not he had anything further to say, to which he made reply that he had not, except that he desired to have the department consider in connection with the cases a little pamphlet which he handed me which showed the high regard in which the clergy—I believe it was the clergy—held the publication. And that circumstance I made a memorandum of and filed it in the case.
>
> Q. Do you remember what was the name of that pamphlet to which he referred?—A. I can not recall it.
>
> Q. If I refresh your recollection with a statement that it was "A General Description

> of the Character and Influence of the Present Day Dime Novels," would you recollect now if that was the name?—A. That was the pamphlet.
>
> Q. What, if anything, did you say to him with respect to the consideration which would be accorded the brief and the time of decision in the case?—A. I told him that the brief and the pamphlet would be carefully considered and that a decision would be rendered in due course.

According to this testimony, Mr. Heines not only had a hearing, but as full a hearing as he desired.

How far is this to be qualified if we accept the testimony for complainants? Mr. Heines, called in rebuttal, on direct examination testified (R. 169):

> A. Well, I called on June 11 and was told to go down stairs with the colored porter to see a Mr. Bacon. And I went down and saw Mr. Bacon and asked him if he had read the brief that I left there the day before. He said he had. And I asked him if he had anything to say about it. He said, no. Then I asked him if that was customary or if it was the custom. He said usually they gave some questions to answer. But in this case they did not. I told him I had come a long way to get a hearing, and he had nothing to say.

On cross-examination he said (R. 172–173):

> Q. Now, you said that when you appeared before Mr. Bacon that he would not talk on the case?—A. Yes, sir; I said that.

Q. Did he say that he would not talk?—A. I asked him if he had anything to say, and he said no, that he did not have anything to say on the subject.

Q. Did he tell you he would not hear you on the subject?—A. He said he had nothing to say.

Q. You are not answering my question. Did he say that he would not hear you on the subject?

Mr. GLASSIE: You meant to say that he used the words "I will not hear you?"

Mr. MCNAMARA: Yes, sir.

Mr. GLASSIE: We object to that.

A. He said he had nothing to say.

Q. Did he say he would not hear anything you had to say?—A. Not in that language.

Q. Or any language like that?—A. He gave me to infer——

Q. Let us leave inferences and impressions out. Did he use any language whose real or proper meaning was that he would not hear anything you had to say?—A. He said he had nothing to say.

Q. That is your best answer to my question?—A. That is my best answer.

Q. You say you tried to draw him out? What do you mean by that?—A. By asking him if he had read the brief that I left with him the day before and if he had anything to say on it.

Q. And that was trying to draw him out?—A. Yes, sir.

Q. Did he compliment you on the brief?—A. I do not remember.

Q. Didn't he say it was very full?—A. He may have said that is very well done, or something like that.

Q. Is it not a fact that he said that the brief covered the case very well?—A. He may have said that.

Q. You asked him then to accept this little pamphlet?—A. Yes, sir.

Q. What did he say as to that?—A. He said yes.

Q. He did not show any disinclination to receive that pamphlet?—A. No, sir. I asked him if he would have that incorporated with the brief I left the day before, and he said he would do so.

Q. At the time you made that request to file this additional pamphlet did you ask him if you might be heard to argue the case orally?—A. I asked him to put me on record as having called.

Q. And he said he would do so?—A. Yes, sir; which he did.

Q. Now the second day you called, which was Tuesday, you met the clerk in the office of the Third Assistant Postmaster General?—A. Yes, sir.

Q. Did that clerk say to you that the party you wished to see was downstairs?—A. No; he said "you are to see Mr. Bacon."

Q. That is the language he used?—A. Something to that effect.

Q. And then it was that he took you downstairs?—A. That he turned me over to one of the porters.

On recross-examination he said (R. 176):

> Q. Mr. Heines, on the 11th of June, the second call you made, what did you have to say or desire to say in addition to what you had said in the printed answer?—A. Well, I was trying to find out what their objection was so as to be able to answer it.
>
> Q. Did you have anything in mind that you wanted to say besides what was contained in the answer?—A. The questions they would ask me would bring up something.
>
> Q. Was there anything in your mind that you desired to say other than what you had incorporated in your answer?—A. No, sir.

Mr. Heines was not hindered from presenting any testimony, for he had none to present, and there was no occasion for testimony. The facts were the publications themselves, and they of course were before the department. As to the issue, the allegation of the bill of complaint itself is—

> * * * The question whether the said publication is a periodical publication within the meaning of the law and therefore entitled to transmission as second-class matter is a pure question of law, to be determined by a comparison of the said publication itself with the conditions set out in the said act of March 3, 1879 [R. 6].

All the evidence bearing upon that issue which is to be found in the record was before the department, and all that was before the department is in the record here.

The complaint of Heines in his testimony is not that he did not get a hearing, but that he did not get such a hearing as he desired. That he suggested nothing more at that time, that he then intended simply to present his printed argument and ask consideration of that, just as testified by Mr. Bacon, is corroborated by that document itself.

This displays in bold type of various sizes on the front cover the legend:

No. 1

In the Post Office Department of
the United States

Tip Top Weekly

Street & Smith, Publishers
New York, N. Y.

Statement and Argument

Response
2:00 p. m. June 11, 1907
to
Citation of May 15, 1907, from
Office of Third Assistant Postmaster
General.

A similar, although not absolutely identical, legend heads the first page. Then, addressing the Third Assistant Postmaster General, the document begins: *"We beg to submit the following response to your citation of May 15, 1907, to show cause why the authorization of admission of our publication, the Tip Top Weekly, to the second class of mail matter should not be revoked."*

The issue, then, is clearly stated, and the question is argued throughout 16 printed pages. Book or periodical is the theme, and the writer deals with it as a matter of the form and also as a matter of the contents of the publication, and says, page 15, that "the foregoing discussion will, we believe, satisfy you beyond all question that the issues of Tip Top Weekly constitute a periodical publication and that they are not in any sense books." It is true he adds, "but if you are not satisfied, we beg a further opportunity to present argument, for there is much more that may be urged in support of our contention."

This, however, is not asking for a present hearing; far from it. He conceives his argument to be entirely sufficient, but makes a request in advance for rehearing in case of an adverse conclusion; and as well might counsel at the bar of this court suggest that, "if the argument we now make is not convincing, hear us again before you decide, for we have something more that we could say, and something more to the purpose." The time to make application for a rehearing was after the decision was announced; and entirely applicable here is what was said in *The Japanese Immigrant Case, supra*, page 102:

> * * * Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard.

One hearing, however, Mr. Heines had, and just such a hearing as he wanted; and, as said by this court in *Reetz* v. *Michigan, supra,* page 508, "if a single hearing is not due process, doubling it will not make it so."

Mr. Bacon made up the record of the case for his superior officer, including in it the little pamphlet, "A General Description of the Character and Influence of the Present Day Dime Novels." Mr. Lawshe considered this case and others, taking advice as he did so from the Assistant Attorney General of the department, and, reaching a conclusion adverse to the complainants, promulgated his order on July 26, 1907, withdrawing from "Tip Top Weekly," and some other publications, the privileges of second-class mail. On August 8, 1907, without applying for a rehearing, the complainants filed their bill. We submit that the department acted after due notice and hearing, and that its order should stand, unless it is on the merits plainly against the law.

II.

We concede that the question whether the "Tip Top Weekly" is a periodical rather than a book can be determined by a comparison of the publication itself with the conditions set out in the act of March 3, 1879. This would seem to be true in every case. That, however, does not divest the Postmaster General of all discretion in the matter.

In *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, l. c. 107, this court said:

> Conceding the principle established in the two cases just decided to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance.

The postal laws divide mail matter into four classes:

First. Written matter;

Second. Periodical publications;

Third. Miscellaneous printed matter;

Fourth. Merchandise.

The first and fourth classes are not involved here and may be dismissed from consideration.

As to the second and third classes, the statute provides (act Mar. 3, 1879, 20 Stat. 355, 359):

> SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.
>
> * * * * *
>
> SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage such matter shall be charged with postage at the rate to which the inclosed matter is subject: *Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.
>
> * * * * *
>
> SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:
>
> First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.
>
> Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: *Provided, however,* That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

* * * * *

SEC. 17. That mail matter of the third class shall embrace books, transient newspapers and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

As the same publication can not be both second and third class, to fall within the second, the highly favored class, it must possess the features described as those of that class, and the characteristics of the third class must be absent.

Copies of "Tip Top Weekly" are exhibits in the case. Examining them, we find that the publication is issued

regularly every week, bears a date of issue, is numbered consecutively, and is issued from a known office of publication.

It is formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

In its physical make-up it meets all the prescribed requirements.

It has a legitimate list of subscribers, and is not designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

So it meets what may be called the commercial tests.

But conformity with the statutory requirements stops with these material and commercial elements.

When we come to look at the contents of the publication we do not find that it is, as prescribed by statute, a periodical "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

Among the exhibits are the issues for the month of July, 1907, being Nos. 586 to 589, inclusive. In each are 32 pages, exclusive of the covers. Each contains a story complete in itself, which takes up 26 pages. The front cover is occupied with a highly colored picture which illustrates some incident of the story. At the end of the story is an announcement of the story which is to appear in the next number, with a

table of its chapter headings. Then follow 3 pages of "Applause," that is, letters from readers approving the publication. Next we have 2 pages of questions from readers asking advice, each for himself, as to diet and exercise, and answers to these questions—a sort of correspondence school in dietetics and athletics. The last page and the back cover advertise the Weekly and its back numbers as published in book form.

The stories are:

July 6, Dick Merriwell's Distrust, or, Betrayed by a Blotter.

July 13, Dick Merriwell, Lion Tamer, or, Ate, Queen of the Air.

July 20, Dick Merriwell's Camp Site, or, the Peril at Pine Point.

July 27, Dick Merriwell's Debt, or, Settling the Score with Smoketown.

The same man, Burt L. Standish, appears as the author of each book, and the hero in these is Dick Merriwell. Generally the hero is his brother Frank.

Each story is one of adventure, the range in the four extending from aquatics to aerial performances, and the perils encountered and escaped are threatened by man and brute and by bird and beast. We have the fierce lion of Numidia and the bucking broncho from the staked plains of Texas. We meet with them, however, not the one on his native prairie and the other in his native jungle, but both in the wastes and wilds of the eastern coast of Maine.

Titles of other numbers of the series,[1] which we set out in the margin, the issues themselves not being part of the record, suggest more extensive travel and a greater variety of adventure. In the *Tousey* case, heard with this, the publication is "Work and Win." The hero in every case is Fred Fearnot, and, as becomes his doughtier name, his adventures, as indicated by the titles subjoined, are of a more thrilling nature.[2]

---

[1] Frank Merriwell in Arizona, or, the Mysteries of the Mine.
Frank Merriwell's Friend, or, Muriel the Moonshiner.
Frank Merriwell's Double, or, Fighting for Life.
Frank Merriwell Meshed, or, the Last of the Danites.
Frank Merriwell in Gorilla Land.
Frank Merriwell's Magic, or, the Pearl of Tangier.
Frank Merriwell in London, or, the Grip of Doom.
Frank Merriwell's Venture, or, Driven from Armenia.
Frank Merriwell's Vow, or, After Big Game in Ceylon.
Frank Merriwell in Japan, or, The Sign of Avenger.
Frank Merriwell's Game, or, Snaring the Sharper.
Frank Merriwell's Drift, or, With the River Drivers.
Frank Merriwell's First Part, or, the Start as an Actor.
Frank in Advance, or, the Adventures Ahead of the Show.
Frank Merriwell's Own Company, or, Barnstorming in the Middle West.
Frank Merriwell's New Venture, or, the Finding of Elsie.
Frank Merriwell's Advancement, or the Engineer of the Mountain Express.
Frank Merriwell Held Up, or, The Robbery of the Mountain Express.
Frank Merriwell as a Ferret, or, Tracking the Train Wreckers.
Frank Merriwell's Peril, or, the Smugglers of the Border.

[2] Fred Fearnot's Treasure Hunt, or, After the Aztecs' Gold.
Fred Fearnot and the Cowboy King, or, Evelyn and the "Bad" Men.
Fred Fearnot and "Roaring Bill," or, The Wickedest Boy in the West.
Fred Fearnot and the Boy Prospector, or, The Secret Band of the Indian Gulch.
Fred Fearnot and the Diamond Queen, or, Helping the Treasury Department.
Fred Fearnot and the White Masks, or, Chasing the Chicago Stranglers.
Fred Fearnot and the Snake-Charmer, or, Out with the Circus Fakirs.
Fred Fearnot Held Back, or, the Time Terry Failed Him.
Fred Fearnot and the Girl of Gold, or, The Female "Wizard" of Wall Street.
Fred Fearnot and "Long Duke," or, The Toughest Man in Texas.
Fred Fearnot and the Silver Syndicate, or, Beating the Wall Street Sharks.
Fred Fearnot and the "Wharf Rats," or, Solving a North River Mystery.
Fred Fearnot and "Ned, The Newsy," or, the Sharpest Boy in New York.
Fred Fearnot's Football Boys, or, Winning on the Gridiron.
Fred Fearnot and the Range Robbers, or, Seeing Justice Done.
Fred Fearnot's Deal in Diamonds, or, The Strange Man from Africa.
Fred Fearnot and the Mill Girl, or, the Factory Gang of Fairdale.
Fred Fearnot's Snow-Shoe Trip, or, A Tough Time in the Rockies.

Manifestly in every case the story is the thing which distinguishes and indeed makes up the publication. The complainants in their statement and argument before the Postmaster General, page 10, recognize this fact. We may well accept their own description of the Weekly, i. e., "each issue contains a complete story, which is substantially its contents, although it contains also a measure of miscellaneous matter," etc. Now, the Postmaster General determined that such a publication was not made for the dissemination of information of a public character, was not devoted to literature, the sciences, arts, or any special industry, and that it was not a periodical in the usual and accepted sense of the term.

What are the successive issues of the "Tip Top Weekly?" With proper apologies to Walter Scott and Charles Dickens, and also to Mayne Reid and Ned Buntline, they are novels, not indeed tales of love, but tales of astounding adventure—novels none the less. Here, again, we are in accord with the complainants. At the hearing in the department Mr. Heines presented as something he wished to have considered in connection with his argument a pamphlet entitled "A General Description of the Character and Influence of the Present Day Dime Novels," which he said showed the high regard in which the clergy held the publication. So we have an agreement that each issue of "Tip Top Weekly" "contains a complete story, which is substantially its contents," and that this story is not an apologue or par-

able designed to point a moral, but a dime novel. So, substantially speaking, each issue of the Weekly is a complete dime novel, and, substantially speaking, it is nothing more.

In *Bates and Guild Co.* v. *Payne*, *supra*, the Postmaster General held, and this court sustained him, that "Masters in Music" was not a magazine, but was sheet music disguised as a periodical and should be classified as third-class mail matter. And yet "Masters in Music" had the physical and commercial features of a magazine and, in addition to 32 pages of music in each number, had a portrait of the particular master dealt with, a sketch of his life, "and estimates of his genius and place in art, chosen from the writings of the most eminent musical critics."

"Tip Top Weekly" and "Work and Win" are but a recrudescence of the dime novel publications of Beadle and Munro, and this without disguise save as to shape and size. And, being novels, they are books. If it be said that these publications are too ephemeral to be dignified as books, it is to be considered that they are ephemeral because of their quality and only a little more so than myriads of publications in the very form of books which are constantly pouring from the press. The test here is not literary rank or value. It is peculiarly true for the present purpose that "A book's a book although there's nothing in't."

Passing any question of quality, How are books and periodicals to be distinguished? This court

dealt with the question in *Houghton* v. *Payne*, 194 U. S. 88, l. c. 97, and said:

> While it may be difficult to draw an exact line of demarkation between periodicals and books, within which latter class the Riverside Literature Series falls, if not a periodical, it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue.
>
> A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of [or] some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation

Weekly" and "Work and Win." "Pickwick" is a book now, and it was a book when its monthly installments were so eagerly awaited by the Captain in Cranford and when for another good soul death was diminished in its terror, because of the physician's assurance that it would not come until there had been another coming of Sam Weller. Every number of the Papers was a book, incomplete indeed, but a book, as the "Mystery of Edwin Drood" is a book, although the pen of the author was forever stayed at the sixth number.

What is the difference between "Pickwick Papers," appearing at intervals of a month, and "Tip Top Weekly?" It seems like sacrilege to ask the question. But, remember, we are asking it only for the purposes of postal classification, and for this purpose there is no difference; they are both books and not periodicals. And this is so, although Frank Merriwell is not very like Sam Weller. For our purpose the "Pickwick Papers" and "Nicholas Nickleby" were books, no more and no less, than were the tawdry plagiarisms and puerile imitations, the "Pickwickians Abroad" and "Nicholas Nickleberry."

Thousands of stories have appeared in book form, even in a covering of full levant, and have gone to the paper mills, stripped of their covering, to be mashed into pulp, short lived, not because they were periodicals, but because they were literary trash, because they possessed nothing of permanent interest, while many a periodical, because it grasped the substantial in the passing show of life, has become a book. A

periodical may become a book, but a book can not become a periodical.

In *Houghton* v. *Payne*, *supra*, the court say, page 96, that the periodical intended is "a periodical in the ordinary meaning of the term." Newspapers aside, a periodical in ordinary meaning is a magazine or a quarterly, and in the days of our fathers it might also be an annual. The greater the interval of issue, the greater the likeness in form and contents to a book. The old annuals, like the "Liberty Bell," were books in form and in fact, and were never dealt with in the postal laws as periodicals. And some quarterlies were published in book form, as the Anglo-Saxon Review, the binding of which was a distinctive feature, and so could not pass as second-class mail. But the publication issuing regularly, and at least quarterly, and not in stable book form, it was not necessarily "a periodical in the ordinary meaning of the term." To quote again from *Houghton* v. *Payne*, page 97, "a periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of [or] some special branch of learning or to a special class of subjects."

"Tip Top Weekly" does not answer this description in any respect.

The rule in the case cited is not a hard and fast one the requirements of which must be precisely met; but it should be approximated in its essential parts.

We do not deny the quality of "periodicals" to this Weekly because all the issues are written by one man. The "Tatler" was a periodical from the beginning and while Steele was yet writing all the numbers, as much so as it was after he had called Addison to his aid, and as much so as were the "Spectator" and the "Guardian." As was said of Steele, "he brought his daily observations of life, his gleanings in society, his early studies, his critical estimates of authors and actors, and his reflections on the destiny and duty of his fellows, to bear on his essays—now drawing a pathetic picture, and now entering a satirical protest, advocating amelioration in manners, suggesting improved standards, winning to more wise pastimes and more gracious intercourse." The "Tatler," the "Spectator," and the "Guardian," as their issues appeared, whether the number was written by Steele or Addison, or whether both contributed, were periodicals in the true sense. The contents made them so. They justified the motto—

> Whate'er men do, or say, or think, or dream,
> Our motley paper seizes for its theme.

There was in these publications the essential variety of every day life, as much so as in the newspaper of to-day. Their high literary quality did not change their nature in that respect. The subject matter was of current and varied interest. The literary quality fixed that interest and made it constant, permanent.

The "Spectator" in its day and as it appeared at its short, stated intervals was a periodical in form and in fact. It contained the important news, it commented

upon the manners and morals of the time, and found its inspiration and its texts in passing events. The sequence of its numbers was a natural current one. To-day the "Spectator" is a book and is published as one. And to republish it at the present time, serially and in its original sequence, would not make a periodical of it any more than to publish the "Decline and Fall of the Roman Empire" at regular intervals, in chapters, would make that a periodical. The number of the "Spectator" or the chapter of Gibbon would have no sort of relation to the interests of the time when it made its appearance. Publication in the original order of numbers or chapters would be essential to the use of either as a book, and for that reason the order would be observed.

That there is but one author of "Tip Top Weekly" does not make a periodical of the publication because what he writes has no variety of topic. It is adventure and adventure, and nothing but imaginary adventure, each complete in itself. It is not devoted to literature, nor to any special branch of learning, nor to a special class of subjects. There is no relation of any one number with any prior or subsequent number of the same series.

It is true that the same names frequently recur in these stories. Frank Merriwell is the hero in nearly all of them. In a few his brother Dick holds the title rôle. The same companions may attend them. None the less, each story is complete in itself, and is intended to be so. It is advertised and sold as

such. We may begin reading anywhere in the series and end anywhere, and we may go forward or backward. The names in the stories have no significance. The "Work and Win" names would serve the "Tip Top Weekly" perfectly. Frank Merriwell and Fred Fearnot could change names and adventures as easily as caps and coats. The very number of the stories, several hundred, in which each so-called protagonist appears, demonstrates the want of individuality in the characters.

Thackeray makes the Beatrix of Henry Esmond reappear as the Baroness Bernstein of the Virginians, and by the introduction of George Warrington in Pendennis exhibits to us descendants of Henry Esmond in the fifth generation. And something more there is of this reappearance of characters in Thackeray, but not a great deal. His genius was not equal to making one man the hero of five hundred stories. Dickens revived Pickwick and the Wellers in connection with another story, but he soon permitted them to retire and let the story of Little Nell run to its close without interruption. And though Pickwick and the Wellers were thus brought to life again in "Master Humphrey's Clock," the name under which "Old Curiosity Shop" and "Barnaby Rudge" were first published, and although the "Clock" appeared weekly and regularly for 80 weeks and in paper covers, it was not a periodical but a book.

The appearance of Frank Merriwell as the hero in five hundred different and complete stories of

adventure, with no sign that the fancy from which the stories spring has lost its fertility, is conclusive that the stories are isolated tales of adventure, in which the incidents and not the individuals are of importance.

And so it is that there is no occasion—not even that which would exist in the republication of the "Spectator"—for any particular sequence in the series. Look at the titles, not Tip Top Weekly No. 1, Tip Top Weekly No. 2, etc., but the real titles, those of the stories. They suggest no order. It makes no difference as to the particular date when Frank Merriwell solved the "Mysteries of the Mine," or "Snared the Sharpers," or was "Barnstorming in the Middle West," or succeeded in the "Finding of Elsie," or "Tracked the Train Wreckers." He could do them, or any of them, one day as well as another, and one week would serve as well as another for telling the story. The only element of unity in the series is the monotony of nomenclature, the result of sheer repetition; but this monotony does not give the continuity of literary character which makes the magazine or review.

The single number lacks the variety and the series the unity which are essential to constitute a periodical in the ordinary sense of the term. These things are books and complainants deal with them as such. They publish back numbers, by reprinting them in book form and binding two or three numbers into one volume, the bound series being known as the

"Medal Library." Here, then, we have the same thing published in book form and in periodical form. It is the same thing as to contents in both. And it is not like the "Spectator," a periodical which has become a book, whose interest, when published, was current, and from its literary quality and historic value has become constant. The bound volumes of the "Medal Library" are just as current to the boy who has not read them as is the last unbound issue of the Weekly. The volume of the "Medal Library" probably will not find as large circulation as the issue of the Weekly, but that is because it has been published before and has been read by many, and in this respect it does not differ from any other cheap novel.

The distinguishing feature of the periodical is its current continuity. This is most marked in the daily newspaper. We read it and cast it aside, however interesting its collection of news or well written its editorials. It deals with passing events and it passes with those events. In a few large libraries it is filed away for the use of the future historian, but the general reader has no place in his home for the great folios that would result from binding his daily paper into permanent form. He simply awaits the next issue. So the best newspaper is as to each of its issues ephemeral because its subject matter is of transient concern. But it has continuity through its succession of issues.

The magazine, as it is less frequent, is less transient in interest than the daily. It is neither written nor

read in such haste. It remains longer upon the library table, more frequently finds its way to library shelves. Still its interest is transient, and in its topics we expect a certain timeliness. There may be, and in the magazines most familiar to us there is, literary matter which is not transient. Novels of the best writers may run through the numbers, to be afterwards published in book form, and in this way much of our poetry makes its first appearance. But this is only one feature of the literary magazines, and the use of generations has determined its propriety. But however much there may be in the magazine that is constant, there is much that is current. Matters of present, passing interest, although not so ephemeral as much which fills the columns of the daily papers, are dealt with, the progress of the arts and sciences, the changes in customs and manners, the flux of things. And this is true not only of the magazines of general scope, but as well of the journals of the trades and professions, and of the various cults and creeds, and of the journals of fads and fancies. Even the railway guide has this present, passing interest. However much it may repeat itself in its various issues, and even though during some months there should be no change in any railway schedule in the United States, the current number is of present interest because it informs us what the schedules are now, and the preceding number has lost its interest because it deals with what is now past and may have been greatly changed.

The quarterly, as we would infer from its periods of publication, is a more serious journal. Nothing engages its attention which can not live throughout three months. But while its subjects are of deep, they are still of present, interest. Taking up at random a number of the North American Review—that of January, 1869, when it was still a quarterly—the contents were found to be very distinctly of contemporaneous interest, and running through the numbers upon either side of 1869 there was found a continuity of design and a certain individuality, not of authorship either, notwithstanding the great variety of topics treated.

The "Tip Top Weekly" deals with fiction, and only with fiction, and that is the subject matter of a great majority of the books which issue from the press of to-day. It appeals, as does every work of fiction, to the imagination. Its own peculiar appeal is to the imagination of youth, and its every issue makes the same kind of appeal. It has no current quality, and the interest of any and every issue is present only as it is ever present—perennial. And so we submit that each of these various tales of Frank Merriwell's adventures, as well as those of Fred Fearnot, is a book; and we believe we do no injustice to complainants when, adopting the language of this court in *Houghton* v. *Payne*, we say that "the reason why books of the 'Tip Top Weekly' and 'Work and Win' series are issued periodically is too palpable to require comment or explanation."

The suggestion that the Postmaster General is estopped or bound by the action of his predecessors, and that he must accept their construction of the law as to what constitutes a periodical, is disposed of by *Houghton* v. *Payne*, and need not be discussed here.

It is said, also, that other publications of like character with the "Tip Top Weekly" are permitted to pass through the mails as second-class matter; but it is not apparent how that gives a right to the complainants which otherwise they would not have. This case was tried in 1907 in the Supreme Court of the District. The presumption, of law and of fact, is that the Postmaster General has done his duty faithfully and impartially; that if there were other publications enjoying second-class privileges, when not entitled to them, the privileges have been withdrawn. The Postmaster General had to deal with each individual case and decide that as his judgment of the merits required. He has done that in this case, and we respectfully submit that his action and the action of the Court of Appeals approving it should be affirmed.

F. W. LEHMANN,
Solicitor General.

MARCH, 1912.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

FRANK TOUSEY, PUBLISHER, A CORPORATION, appellant,
v.
FRANK H. HITCHCOCK, POSTMASTER General of the United States.
No. 251.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

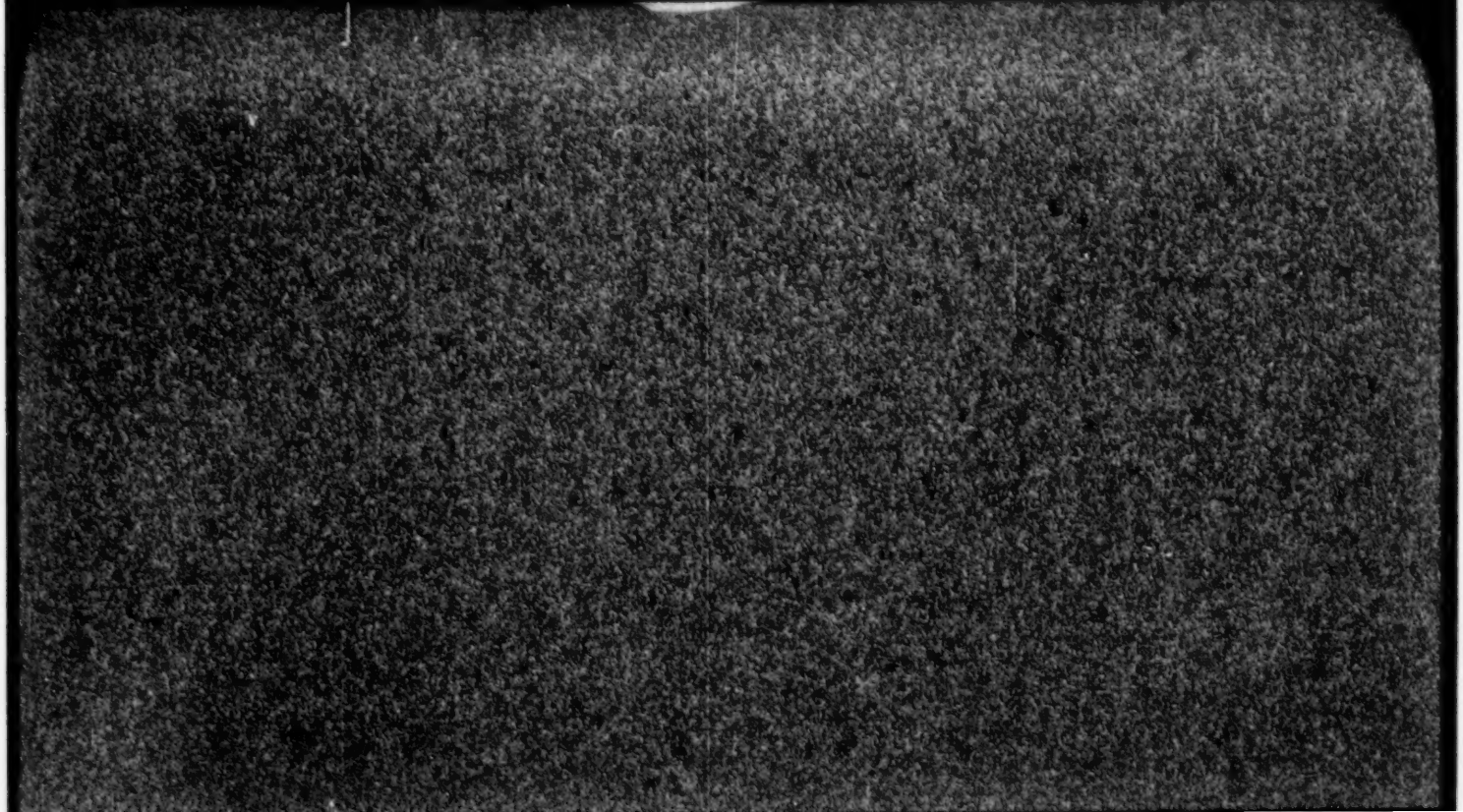
This case, we agree with counsel for appellant, is in every substantial respect like No. 250, with which it is to be heard. There was below some suggestion that there is a difference in the matter of the hearing, the Tousey Company having been cited for the 12th of June and no one appearing for it on that day. We agree with counsel for appellant that there is no significance in this, and that the Tousey Company should not, under the circumstances, be held to have made default. As goes the one case, so should the other go.

For the reasons set forth in our brief and argument in No. 250, this case, we respectfully submit, should be affirmed.

F. W. LEHMANN,
Solicitor General.

MARCH, 1912.

O



INDEX.

	Page.
STATEMENT OF THE CASE	1–3
(1) A suit to enjoin revocation of second-class mail privileges	2
(2) Questions involved	2
ARGUMENT:	
First Point. The Postmaster General granted to the publishers a "hearing" as required by law	3–15
(1) The law requiring a hearing (Act Mar. 3, 1901)	3
(2) The hearing was had before the Third Assistant Postmaster General through the Chief of the Classification Division (Rev. Stat., § 161; Postal Laws, 1902, § 6, 19; act Mar. 3, 1901)	3–4
(3) Notice of the hearing	4–6
(4) The hearing on June 11, 1907	6–8
(*a*) Events occurring June 10–11, 1907	6–7
(*b*) What is a hearing?	8
(*c*) The publishers submitted a brief at the hearing	9
(*d*) Review of testimony	10–12
(*e*) Review of appellants' contention	13–15
Second Point. The issues of the "Tip Top Weekly" are not "newspapers or other periodical publications" within the meaning of the postal laws; but they are "dime novels" and, as such, are "books," and the Postmaster General's decision to that effect should not be reviewed here	16–44
Analysis of the postal laws governing second and third class mail matter, and the distinction between a periodical and a book	16
Bates & Guild Co. v. *Payne*, 194 U. S., 106	19
Houghton v. *Payne*, 194 U. S., 88	18
Smith v. *Payne*, 194 U. S., 104	19
I. The decision of the Postmaster General is conclusive and should not be reviewed	20
Bates & Guild Co. v. *Payne*, 194 U. S., 106	20

II. Each issue of the "Tip Top Weekly" is a "dime novel" complete in itself—a "book," neither more nor less. Its contents so demonstrate ..... Page. 23

DESCRIPTION AND ANALYSIS OF THE ISSUES OF THE "TIP TOP WEEKLY" 23

(1) A mere compliance with the statutory requirements does not make the publication a periodical 26

Houghton v. *Payne*, 194 U. S., 88 26

Bates & Guild Co. v. *Payne*, 194 U. S., 106 26

Smith v. *Payne*, 194 U. S., 104 26

(2) The contents of the publication determine whether or not it is a periodical 26

Bates & Guild Co. v. *Payne*, 194 U. S., 106 27–30

Houghton v. *Payne*, 194 U. S., 88 ..... 26, 28, 29

Smith v. *Payne*, 194 U. S., 104 27

(*a*) The reprinting feature was not the determining factor in *Houghton* v. *Payne* and *Smith* v. *Payne* 30

Smith v. *Payne*, 194 U. S., 104 31

Longfellow's "Evangeline" 31

(*b*) Nature of periodicals 31–32

Early history 31–32

Newspapers 33

The Magazine 34

The Quarterly 35

Books 35

(*c*) Issuance of famous novels in monthly parts 36

(*d*) Reappearance of characters in fiction 37–38

(*e*) Propriety of admission of other publications is irrelevant here 39–40

(*f*) The Government's objection is not because there is but one author and one story to an issue 40–42

The Spectator.

The Tatler.

The Rambler.

(*g*) The "Tip Top Weekly" issues are nothing but "dime novels" 42–44

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

NOS. 31 AND 32.

ORMOND G. SMITH ET AL., TRADING AS Street & Smith, *Appellants*,
vs.
FRANK H. HITCHCOCK, POSTMASTER General, *Appellee*. } No. 31.

FRANK TOUSEY, PUBLISHER, *Appellant*,
vs.
FRANK H. HITCHCOCK, POSTMASTER General, *Appellee*. } No. 32.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

These are test cases involving the question whether the ordinary "dime novel" is a *book* and hence third-class mail matter, or whether it falls within the designation of "newspapers and *other periodical publications*" and is therefore second-class matter.

The Postmaster General revoked the authority of Street & Smith (appellants in No. 31) to enter the "Tip Top Weekly" and of Frank Tousey, a corporation (appellant in No. 32), to enter "Work and Win" at the New York City post office as second-class mail matter, upon the ground that those publications were "books." (Rec., 11.)

The publishers sued to enjoin the Postmaster General from revoking such authority and to compel the Post Office Department to receive and transmit the publications in question as second-class mail matter at 1 cent per pound.

The trial court granted permanent injunctions upon the ground that the Postmaster General had not granted a "hearing" to the publishers before revoking the second-class mail privilege. This decision was reversed by the Court of Appeals of the District of Columbia with directions to dismiss the bills in both suits. (*Hitchcock* v. *Smith*, 34 App. D. C., 521.)

The publishers have appealed.

The facts are undisputed. The cases are similar, being heard by stipulation on the same evidence. For convenience, we will deal with the "Tip Top Weekly" case, *Street & Smith* v. *Hitchcock, Postmaster General*, No. 31.

There are two, and only two, questions presented:

First. Did the Postmaster General (before revoking the second-class mail privilege) grant to the publishers a "hearing" as required by law?

Second. Are the publications in controversy "books," or are they "newspapers or other periodicals?"

FIRST POINT.

The Postmaster General granted to the publishers "a hearing" as required by law.

1. *The law requiring a hearing.* In 1897 the "Tip Top Weekly" was admitted to the mails as second-class matter. (Rec., 9, 14.)

An act of March 3, 1901 (31 Stat., 1099, 1107), provides—

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a *hearing* shall have been granted to the parties interested.[1]

2. *The person before whom the hearing is to be held.*—The act does not prescribe before whom the hearing should be had nor the procedure to be followed. All that was designedly left to the Post Office Department to work out.

By express authority of law, the Postmaster General assigned to Mr. A. L. Lawshe, the Third Assistant Postmaster General,

> "The classification of mail matter;"

and further provided that Mr. Bacon, the "Chief of Classification Division" (an office created by the

[1] The power of the Postmaster General to destroy a magazine by withdrawing the second-class privileges is practically not reviewable by the courts except in case of fraud or mistake of law; and to avoid a possibly hasty exercise of such power, the act of March 3, 1901, was passed so as to afford the publishers an opportunity to present to the Postmaster General any arguments or facts they desired, before he took final action.

act of March 3, 1901, *supra*), should have especial charge, under the Third Assistant Postmaster General, of—

> the determination of the admissibility of publications to the second class of mail matter, and their *right to continue therein*.[1]

3. *The notice of the hearing.*—On May 17, 1907, Mr. Lawshe wrote to the publishers that in accordance with the above act of March 3, 1901, they would be granted a hearing at his office on June 11th at 2 p. m. to show cause why the second-class mail privileges should not be revoked and third-class rates charged the "Tip Top Weekly" upon the ground—

> "That the issues of the 'Tip Top Weekly' do not constitute a newspaper or other periodical publication" as required by the law governing second-class mail matter, "but are in fact books," which are third-class matter. (R. 9, 148.)

---

[1] Rev. Stat., § 161; Postal Laws and Regulations (Ed. 1902), which provides (§ 6, 19, subsec. 1, 8):

1. "To the Third Assistant Postmaster General is assigned * * * the classification of mail matter."

8. "The Division of Classification of Mail Matter, under the supervision of a chief of division, is charged with the consideration of all questions relating to the classification of matter admissible to the mails, intended or deposited for mailing, including the determination of the admissibility of publications to the second class of mail matter and *their right to continue therein*."

The classification of mails is an administrative act, and the hearing provided for is a hearing of a kind appropriate to the proper discharge of administrative functions. The hearing was to be by the department and not by a court. It required notice and opportunity to present evidence and argument, but it did not require all the formalities of judicial procedure. That legal questions were to be determined does not alter the case. (*Reetz* v. *Michigan*, 188 U. S., 505, 507; *The Japanese Immigrant case*, 189 U. S., 86, 101.)

The notice in full is printed in the margin.[1]

It will be observed that the notice does not say that the hearing will be "by" or "before" the Third Assistant Postmaster General, but only that it will be "*at* the office of the Third Assistant Postmaster General."

It would be difficult to frame a notice that would state more specifically the precise object of the hearing. It cited the act requiring the hearing; it fixed the time and place of hearing; it named the publication; it cited the act defining second-class and third-class mail matter; it stated that the "ground" of the proposed revocation was that the publications were not a "newspaper or other periodical publication" as required by the act governing second-class

---

[1] Note—

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
DIVISION OF CLASSIFICATION,
Washington, May 17, 1907.

PUBLISHERS OF THE TIP TOP WEEKLY,
New York, N. Y.

SIRS: You are hereby notified that, in accordance with the act of Congress approved March 3, 1901 (ch. 851, 31 Stat. L., 1107), *you will be granted a hearing at the office* of the Third Assistant Postmaster General, Washington, D. C., at 2 p. m., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip Top Weekly to the second class of mail matter under the act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, *upon the following ground:*

That the issues of the Tip Top Weekly *do not constitute a newspaper or other periodical publication* as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (ch. 180, 1 Supp. R. S., page 246), governing "mailable matter of the second class," *but are in fact books*, which, under section 17 of said act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Your answer, in writing, must be submitted on or before June 11, 1907.

Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

A. L. LAWSHE.

mail, but "are in fact books" under the act governing third-class mail.

The publishers in their bill of complaint aver (R., 6):

> That the question whether the said publication is a periodical publication * * * and therefore * * * second-class matter *is a pure question of law*, to be determined by a *comparison* of the said publication itself with the conditions set out in the said act of March 3, 1879.

The notice was specific in calling attention to the one precise question the department was considering, to wit, whether the "Tip Top Weekly" was a periodical publication or a book; and, indeed, its sufficiency is not seriously questioned in appellants' brief.

4. *The hearing on June 11, 1907.*—The hearing was set for June 11th. The publishers sent their representative, Mr. Heines, a day ahead of time. The events may be thus summarized:

June 10. Mr. Heines called at the office of Mr. Lawshe, Third Assistant Postmaster General, and left with his secretary a sixteen page printed brief on behalf of the publishers. This brief was immediately sent to Mr. Bacon, Chief of the Classification Division. (R., 46, 52, 53, 130, 131.)

June 11. Visit No. 1: Mr. Heines called at the office of the Third Assistant Postmaster General, saw his secretary, who took his card to Mr. Lawshe, who wrote a word of introduction upon it and directed him to be shown to Mr. Bacon, Chief of Classification Division, as the man he would have to see. (R., 47, 53, 122, 130.)

June 11 (Con.) Visit No. 2: Mr. Heines was taken to Mr. Bacon, Chief of Classification Division, had an interview with him, and asked if he had read the brief that had been left with Mr. Lawshe the previous day. Mr. Bacon informed him that he had read it and asked Heines if he had anything else to say on the subject; to which Heines replied that he had nothing else to say. (R., 47, 48, 53, 54, 122, 123, 168–170.)

Visit No. 3: Mr. Heines went back to Mr. Lawshe, but did not see him, as he was still engaged. (R., 48, 53.)

Visit No. 4: Mr. Heines then returned to Mr. Bacon's office and gave him an additional printed pamphlet entitled "*A General Description of the Character and Influence of the Present Day Dime Novels,*" written by a clergyman, with the request that it be treated as a part of the publishers' brief, which was done. (R., 48, 123, 164, 165, 170, 172.)

Mr. Heines returned to New York.

June 12 to July 26. Mr. Bacon and Mr. Lawshe both read the briefs and pamphlets submitted by the publishers; took an opinion from the Assistant Attorney General for the Post Office Department; considered the whole case and reached the conclusion and accordingly *decided* that the "Tip Top Weekly" was not a "newspaper or other periodical publication" as required by law to be entitled to second-class mail privileges, but was a "book," and hence third-class matter. (R., 148, 159–163, 124, 127, 166.)

The order of revocation was then made. (Id.)

The publishers then insisted that the question involved was, as subsequently stated in the bill of complaint, "*a pure question of law*, to be determined by a comparison of the said publication itself with the conditions set out in the said act of March 3, 1879."

There was no question of disputed fact; an argument upon the law, as applied to the publication in evidence, was all that could be made.

The law required that a "hearing" should be granted to the publishers. It is thus defined:

> A listening to facts and evidence for the sake of adjudication. (*Webster.*)
>
> Opportunity to be heard. (*Webster; Century.*)
>
> Attention to what is delivered. (*Webster.*)
>
> Audience. (*Webster; Century.*)
>
> The receiving of facts and arguments thereon for the sake of deciding correctly. (*Merritt* v. *Village*, 8 Hun., 40, 45.)

The Post Office Department was only required to *listen* to what the publishers had to say; to afford them an opportunity to present such views as they might care to submit. The attitude of the department was passive, not active. It was "up to" the publishers to submit their facts and arguments to the department, which was only required to receive and listen to them. The department did so.

In advance of the hearing, the publishers submitted their printed brief to the Third Assistant Postmaster

General.[1] He referred it to the Chief of Classification Division, who was charged, by law, with the determination of the right of publications to continue as second-class mail matter; and he promptly read it.

On the day of the hearing, the publishers' representative, Heines, personally appeared before the Chief of Classification Division (R., 47, 48, 171); ascertained that the latter had already read the brief (R., 48, 169); submitted an additional printed pamphlet (R. 54, 123, 172, 173); and asked to be noted of record as having appeared in response to the citation, which was done (R. 48, 170), was asked if he had anything else to say or submit on behalf of the publishers, to which he replied "No." (R. 123, 127, 165.)

Mr. Heines expressly admitted that he filed no other papers; offered to file no others; had no others to

[1] The cover of the brief was in bold type as follows:

No. 1
In the Post Office Department of
the United States
Tip Top Weekly
Street & Smith, Publishers
New York, N. Y.
Statement and Argument
Response
2:00 p. m. June 11, 1907
to
Citation of May 15, 1907, from
Office of Third Assistant Postmaster General.

It began: "We beg to submit the following response to your citation of May 15, 1907, to show cause why the authorization of admission of our publication, the Tip Top Weekly, to the second class of mail matter should not be revoked."

For 16 pages it argued fully the question of whether the "Tip Top Weekly" was a "periodical publication" or a "book" within the meaning of the postal laws, just as appellants' brief in this court now argues the same point.

file; and had nothing in mind to say other than was contained in the brief filed. (R. 172, 174, 176).

What more in the way of a "hearing" did he want? He certainly did not ask for anything else; and he made no complaint that the department was failing to give him a proper hearing. After the adverse decision, we hear for the first time an objection to the sufficiency of the hearing.

One explanation lies in the fact that Mr. Heines was not a lawyer. He was an old employee in the "dime-novel" factory; he brought his family down with him from New York to Washington for the "hearing;" he seems to have thought he would be the central figure on an important occasion; and his idea of a "hearing" was the precise reverse of what it is. If his present testimony truthfully reflects his views at that time (although he gave no outward indication of such views to Mr. Bacon), he evidently thought a hearing consisted, not in the Post Office Department hearing him, but in his hearing the Post Office Department. As said by the Court of Appeals:

> * * * His real object in appearing before the department was to gain further information concerning the attitude of the department toward the publication mentioned in the citation and not to make an argument before anyone.

Extracts from his testimony, as shown in the margin, show this to be the case.[1]

Mr. Heines seemed to think that it was the duty of the department to question him, rather than his business to present his own case to the department. This is well illustrated by his rebuttal testimony. Mr. Bacon had testified as follows (R., 164):

> Mr. Heines was given an opportunity to make any statement he cared to make and did not seem disposed to make any statement of the matter other than to present this little pamphlet, The Influence of the Dime Novel, and the briefs which he filed.

---

[1] Question. Why didn't you mail that brief from New York?

Answer. Well, I wanted to get a hearing to see what *they* had to say about it. I wanted to come down and leave the brief and get *their answer* and see what *they* had to say about it. (R., 169.)

Answer. I handed him the document and told him I would be in town and would call to-morrow by appointment at 2 o'clock to give him an opportunity to read the paper to see if he had anything to *ask* the next day. (R., 47.)

Question. What occurred between you and Mr. Bacon.

Answer. We looked at one another and I asked him if *he had anything to say to me* and he said no. * * * I asked him if he received the document I left the day before and he said he had it. * * * I told him I was down there to *answer any questions* they might ask me.

Question. What did Mr. Bacon say?

Answer. "I haven't anything to ask." I asked him if he had read it [the brief] and he said "Yes." I said, "Have you anything to ask me," and he said "No." * * * (R., 48.)

Answer. * * * I asked him [Bacon] if he had any questions to ask, and he simply said "No." (R., 53.) He did not ask me anything bearing on the case at all. (R., 170.) I asked him if he had anything to say, and he said "No," that he didn't have anything to say on the subject. (R., 172.)

When Mr. Heines's attention was directed to that testimony, he said (R., 168):

> I gave Mr. Bacon every opportunity. In fact, I tried to draw him out.[1]

Over and over again, Mr. Heines repeats this complaint:

> I was there to answer questions. He had nothing to say. He said he had nothing to say, etc.

The whole matter is explained in his rebuttal testimony (R., 176).[2]

Mr. Bacon testified (R., 123 et seq., 165) that he told Mr. Heines he had read the brief and that it seemed to cover the cases very fully; asked him if he had anything further to say, to which Heines replied that he had not; that Heines asked to have an additional pamphlet considered as part of the record, which was done; that he told Heines the brief and pamphlet would be fully considered and that—

> Mr. Heines was given an opportunity to make any statement he cared to make, and did not seem disposed to make any statement

[1] Question. You say you tried to draw him out. What do you mean by that?

Answer. By asking him if he had read the brief that I left with him the day before and if he had anything to say on it. (R., 173.)

[2] Question. Your complaint is that they did not ask you any questions, is it not?

Answer. Yes, sir.

Question. You felt that because you were not asked questions you did not get a hearing?

Answer. Yes, sir. * * * After hearing our brief, I thought they would have some questions to ask me then.

Question. Your complaint is that you did not have these questions put to you?

Answer. Yes, sir. (R., 177.)

> of the matter other than to present this little pamphlet, The Influence of the Dime Novel, and the briefs which he filed.

The Government submits that the foregoing evidence demonstrates that the publishers were granted a hearing before their privileges were revoked; that they were notified of the time and place and of the precise question involved—"periodical" or "book;" that they briefed that question fully; that they could have introduced any oral or documentary evidence they desired and have orally argued the case before Mr. Bacon, but they preferred to rest the case on the brief.

The fact that if they had employed a competent lawyer instead of sending an old clerk, they might have made a different presentation of their case, does not alter the fact that they had a hearing—and that is all the law requires.

Review of appellants' contention.

When critically analyzed, all of the objections urged by appellants to the sufficiency of the hearing are reduced to the single point that the department did not at or in advance of the hearing state all the arguments or reasons it had in mind for thinking that the "Tip Top Weekly" was a "book" and not a "newspaper or other periodical publication;" and, therefore, that appellants were denied a hearing because they could not present direct counter-arguments but could only—

> set down such things as occurred to them as showing that their publications were periodicals. (Appellants' brief, page 41.)

The department distinctly stated that the ultimate point involved was whether the "Weekly" was a book or a periodical. That was sufficient. The hearing was to be on that point. The department (before making up its mind on the subject) wanted all the light it could obtain. The department was certainly not obliged, *first*, to furnish the publishers with a tentative expression of the various *reasons* for thinking the "Weekly" a book; and, *second*, thereafter to listen to the publishers' counter arguments. For if that were the true principle, then, if after hearing the publishers, a new argument or reason (perhaps suggested in avoidance of some of the publishers' views) occurred to the department, it could not decide the case until it had in turn submitted such new reason to the publishers and had a further "hearing" upon it, and so on indefinitely.

Indeed, at the time of the hearing, the department, like a court, had not presumably made up its mind; and not until after hearing argument did it reach a conclusion; so it would have been impossible at the hearing to tell the publishers all the arguments that seemed to it to have weight.

The publishers' brief submitted to the department concluded as follows:

> If you are not satisfied, we beg a *further* opportunity to present argument, for there is much more that may be urged in support of our contention.

That was a clear recognition of *one* hearing, but asks in advance for a *rehearing* in case of an adverse decision; and as well might counsel at the bar of this court suggest that, "if the argument we now make is not convincing, hear us again before you decide, for we have something more that we could say, and something more to the purpose." The time to make application for a rehearing was after the decision was announced; and entirely applicable here is what was said in *The Japanese Immigrant Case*, *supra*, page 102:

> * * * Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard.

One hearing, however, Mr. Heines had, and just such a hearing as he wanted; and, as said by this court in *Reetz* v. *Michigan*, *supra*, page 508, "if a single hearing is not due process, doubling it will not make it so."

The department having considered all the documents submitted, decided the case.

The publishers did not then ask for a rehearing (as they of course could have done), but on the contrary filed their bill of complaint. We submit that the department acted after due notice and hearing, and that its order should stand unless it is on the merits plainly against the law.

56588—12——3

SECOND POINT.

The issues of the "Tip Top Weekly" are not "newspapers or other periodical publications" within the meaning of the postal laws; but they are "dime novels" and, as such, are "books;" and the Postmaster General's decision to that effect should not be reviewed here.

The postal laws divide printed matter into two classes: Second-class and third-class matter, respectively. (Act Mar. 3, 1879; 20 Stat., 355, 359.)

Second-class matter embraces

> "All newspapers and other periodical publications"

which must also comply with the following requirements, to wit:

> 1. Issued regularly at stated intervals from a known office of publication as frequently as four times a year, bearing a date of issue and consecutive number, and having a legitimate list of subscribers.
>
> 2. Printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.
>
> 3. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry.

The dominant thought was to encourage the diffusion of intelligence on current affairs by cheap postage; to exclude anything like "books," and only to admit strictly "newspapers and *other* periodical

publications." The doctrine of *ejusdem generis* illustrates the character of periodical publications to be included. Not content with the mere use of the term "other periodical publications," the statute further imposed the numerous above requirements, all obviously designed to exclude "books" as distinguished from periodical publications.

The definition of third-class matter further emphasizes that intention.

Third-class matter "shall embrace *books*, transient newspapers and periodicals, circulars, and other matter wholly in print."

The statute is given in the margin.[1] Third-class matter is an "omnibus clause" covering all other

[1] The act of Mar. 3, 1879, after dividing mail matter into four classes, (1) written matter, (2) periodical publications, (3) miscellaneous printed matter, (4) merchandise, thus defines second-class and third-class matter:

SEC. 10. Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections 12 and 14.

SEC. 14. The conditions upon which a publication shall be admitted to the second class are as follows:

First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. * * *

SEC. 17. Mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

By an act of Mar. 3, 1885, postage on second-class matter was reduced to 1 cent per pound.

matter wholly in print. (*Houghton* v. *Payne,* 194 U. S., 88, 97.) The object of Congress was clearly stated by the Court of Appeals of the District of Columbia (R., 192):

> * * * Congress in extending nominal rates of postage to periodical publications, was actuated by a desire to serve the public rather than the publishers. * * * Congress was endeavoring to provide a speedy and inexpensive vehicle of communication among the people, and that when periodical publications were referred to it did not have in mind dime novels. Books and publications like the one here involved may well await a less expensive if less speedy means of conveyance. There is no need for haste, and no apparent reason why the mails should be burdened with them.

The "Tip Top Weekly" complies with all the formal statutory requirements except that it is not "devoted to literature." Conceding for the moment that it even complies with that stipulation, the material question still remains whether it is a "periodical publication" at all. Mere compliance with the statutory requirements does not necessarily make it a "periodical publication" within the meaning and intent of the statute.

In *Houghton* v. *Payne,* 194 U. S., 88, 96, the "Riverside Literature Series" complied with every statutory requirement, but this court held it was not a periodical publication, saying:

> * * * If the fact be that this series becomes a periodical by a compliance with the

conditions of section 14, under which it is entitled to be transmitted as second-class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, *it does not define a periodical*, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, *it defines certain requisites* of a periodical, *but does not declare that they shall be the only* requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be *a periodical in the ordinary meaning of the term.*

This was reaffirmed in *Smith* v. *Payne*, 194 U. S., 104, and *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, 107.

Appellants earnestly contend that *Houghton* v. *Payne*, 194 U. S., 88, was erroneously decided and cite a mass of legislative and administrative history to support their claim that Congress intended to admit as second-class matter any publication (regardless of the character of its contents) that merely conformed to the requirements laid down in the statute. (Brief, p. 80; 59–81.) We can only reply that Congress drew the line between periodicals and books; that *Houghton* v. *Payne* and *Bates & Guild Co.* v. *Payne* correctly explained that distinction, and we can not add to the force of the reasoning in those cases.

This then leaves open for determination the question—and it is the only question in the case—whether the "Tip Top Weekly" is a "periodical in the ordinary meaning of the term." That question must be determined by the contents of the publication.

The Government submits that it is not a periodical.

I. *The decision of the Postmaster General is conclusive and should not be reviewed.*

In *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, the Postmaster General decided that a certain publication, "Masters in Music," although complying, just as does the "Tip Top Weekly," with all the specific requirements mentioned in the statute, was nevertheless in reality not a periodical. This court sustained his decision as final, saying:

> Conceding the principle established in the two cases just decided [*Houghton* v. *Payne* and *Smith* v. *Payne*] to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought

not to be interfered with unless the court be clearly of opinion that it was wrong.

The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. * * *

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the

> decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.
>
> While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final.

As there, so here: The Postmaster General on comparing the "Tip Top Weekly" with the statutory requirement that it must be a "periodical publication" in the ordinary meaning of the term, reached the conclusion and decided it was not a periodical.

Is not that conclusive? Is this court to review his action on every periodical that is admitted to or excluded from one class rather than another class of mail matter? Argument can not strengthen the plain language above quoted.

In their argument before Mr. Lawshe the publishers urged that "each issue contains a complete story," to wit, a "dime novel." Now, the Postmaster General determined that such a publication was not made for the dissemination of information of a public character, was not devoted to literature, the sciences, arts, or any special industry, and that it was not a periodical in the usual and accepted sense of the term.

The judgment below should be affirmed upon the Postmaster General's finding.

If, however, this court is of the opinion that it should exercise its power to review that decision, then the Government submits:

II. *Each issue of the Tip Top Weekly is a dime novel complete in itself—a "book," neither more nor less. Its contents so demonstrate.*

In every statute for more than 60 years the postal laws have distinguished "books" from "periodicals" in the matter of postage rates. Periodicals are in a favored class. Books and other printed matter generally (music, circulars, advertisements, etc.) are in another class.

The insistent distinction means something.

If a particular publication wants to be in the highly favored class it must prove its title thereto or be consigned to the other class. As the same publication can not be both second and third class, to fall within the second, the highly favored class, it must possess the features described as those of that class, and the characteristics of the third class must be absent.

Each issue of the "Tip Top Weekly" contains about 30,000 words, is about 8 by 11 inches in size, and consists of 32 pages, exclusive of the covers. The front cover is taken up with a highly colored picture illustrating some exciting incident of the story.

The contents consist of a single story, complete in itself, beginning with Chapter I and running through a number of chapters. At the conclusion appears

the legend "*The End.*" That is all there is to it.[1] It is a complete novel.

One man, Burt L. Standish, is the author of all the stories; and the hero is Frank Merriwell or his brother Dick, just as Sherlock Holmes is the hero of Conan Doyle's many stories. Each story is one of adventure, the range extending from aquatics to aerial performances, and the perils encountered and escaped are threatened by man and brute and by bird and beast. We have the fierce lion of Numidia and the bucking broncho from the staked plains of Texas. We meet with them, however, not the one on his native prairie and the other in his native jungle, but both in the wastes and wilds of the eastern coast of Maine.

In the margin will be found a list of titles to other issues of the Weekly; and also the titles in the *Tousey* case, where the hero is Fred Fearnot, and, as becomes his doughtier name, his adventures are of a more thrilling nature.[2]

[1] Two or three pages at the end are taken up with an announcement of the story to appear in the next number; some "Applause," that is, commendatory letters purporting to come from its readers; a few questions and answers on athletics; and an advertisement of the Weekly and its back numbers as collected and published in book form. See Exhibits in custody of the marshal of this court with such titles as "Dick Merriwell, Lion-Tamer or Ate, Queen of the Air;" "Dick Merriwell's District, or Betrayed by a Blotter," and "Dick Merriwell's Debt or Settling the Score with Smoketown."

[2] Frank Merriwell in Arizona, or, the Mysteries of the Mine.
Frank Merriwell's Friend, or, Muriel the Moonshiner.
Frank Merriwell's Double, or, Fighting for Life.
Frank Merriwell Meshed, or, the Last of the Danites.
Frank Merriwell in Gorilla Land.
Frank Merriwell's Magic, or, the Pearl of Tangier.

What, then, are these successive issues of the "Top Top Weekly" and "Work and Win"? Novels.

Frank Merriwell in London, or, the Grip of Doom.
Frank Merriwell's Venture, or, Driven from Armenia.
Frank Merriwell's Vow, or, After Big Game in Ceylon.
Frank Merriwell in Japan, or, The Sign of Avenger.
Frank Merriwell's Game, or, Snaring the Sharper.
Frank Merriwell's Drift, or, With the River Drivers.
Frank Merriwell's First Part, or, the Start as an Actor.
Frank in Advance, or, the Adventures Ahead of the Show.
Frank Merriwell's Own Company, or, Barnstorming in the Middle West.
Frank Merriwell's New Venture, or, the Finding of Elsie.
Frank Merriwell's Advancement, or, the Engineer of the Mountain Express.
Frank Merriwell Held Up, or, The Robbery of the Mountain Express.
Frank Merriwell as a Ferret, or, Tracking the Train Wreckers.
Frank Merriwell's Peril, or, the Smugglers of the Border.
Fred Fearnot's Treasure Hunt, or, After the Aztecs' Gold.
Fred Fearnot and the Cowboy King, or, Evelyn and the "Bad" Men.
Fred Fearnot and "Roaring Bill," or, the Wickedest Boy in the West.
Fred Fearnot and the Boy Prospector, or, the Secret Band of the Indian Gulch.
Fred Fearnot and the Diamond Queen, or, Helping the Treasury Department.
Fred Fearnot and the White Masks, or, Chasing the Chicago Stranglers.
Fred Fearnot and the Snake-Charmer, or, Out with the Circus Fakirs.
Fred Fearnot Held Back, or, the Time Terry Failed Him.
Fred Fearnot and the Girl of Gold, or, the Female "Wizard" of Wall Street.
Fred Fearnot and "Long Duke," or, the Toughest Man in Texas.
Fred Fearnot and the Silver Syndicate, or, Beating the Wall Street Sharks
Fred Fearnot and the "Wharf Rats," or, Solving a North River Mystery.
Fred Fearnot and "Ned, The Newsy," or, the Sharpest Boy in New York.
Fred Fearnot's Football Boys, or, Winning on the Gridiron.
Fred Fearnot and the Range Robbers, or, Seeing Justice Done.
Fred Fearnot's Deal in Diamonds, or, The Strange Man from Africa.
Fred Fearnot and the Mill Girl, or, the Factory Gang of Fairdale.
Fred Fearnot's Snow-Shoe Trip, or, A Tough Time in the Rockies.
Fred Fearnot's Search for Evelyn, or, How She Got Lost.
Fred Fearnot's Streak of Luck, or, The Gold Gang of Gilt Edge.
Fred Fearnot and the Kentucky Girl, or, Down in the Blue Grass Country.
Fred Fearnot and "Nervy Ted," or, the Pluckiest Boy in Wall Street.
Fred Fearnot and the "Yellow Queen," or, the Mysterious Sign of the Seven.
Fred Fearnot's Range Riders, or, Hunting Down the Outlaws.
Fred Fearnot and "Pittsburg Pete," or, Lively Times in the Oil Country.

Each issue is a complete dime novel. The publishers in their brief before the Third Assistant Postmaster General declared that "each issue contains a *complete story*" and to sustain its claim as proper literature filed as part of their argument a pamphlet entitled "A General Description of the Character and Influence of the Present Day *Dime Novels.*"

So it is conceded, nay, actually urged by the publishers, that each issue is a dime novel complete in itself.

1. Does the fact that separate complete novels are thus issued at regular intervals, dated, numbered consecutively and printed in unsubstantial form, etc., constitute the collective series a periodical? Of course not. As said in *Houghton* v. *Payne*, "the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical." As pointed out (page 18, *supra*) *Houghton* v. *Payne*, 194 U. S., 88, 96; *Smith* v. *Payne*, 194 U. S., 104; and *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, 107, decided definitely that mere compliance with all such express formal statutory requirements did *not* constitute the publication a periodical.

2. Whether a given publication is a periodical must be settled by a determination whether the *contents* constitutes it a periodical in the ordinary meaning of the term.

Three prior decisions of this court are conclusive of this controversy.

In *Houghton* v. *Payne*, 194 U. S., 88, the Riverside Series was issued in strict compliance with all the

statutory requirements. Each issue was a single novel or story, or a collection of short stories or poems, and most were reprints of standard works of Thackeray, Whittier, Lowell, Emerson, etc., and of high literary value. It was held that such a series (while strictly conforming as does the "Tip Top Weekly" to all the requirements mentioned in the statute), was not a "periodical publication" within the meaning of the postal laws, because the contents of the separate issues were not what are ordinarily understood by a periodical.

In *Smith* v. *Payne*, 194 U. S., 104, the same firm of Street & Smith (appellants in No. 31) similarly issued as a periodical "The Medal Library," which was made up of a reprint or collection of several issues of the "Tip Top Weekly," bound together to make a fair sized volume. It was held that they were not periodical publications.

In *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, a publication called "Masters in Music" was issued as a monthly magazine, complying with all the statutory requirements. Each issue was complete in itself, the contents being devoted to a portrait, life and critical estimate of, and musical selections from, some great musician. This court upheld the action of the Postmaster General in refusing it admission as second-class mail, saying (p. 110):

> "In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the work of a single master, with a greater part of the pamphlet devoted

> to specimens of his genius, shall be controlled by the cover, which declared that the numbers will be issued monthly, at a certain subscription price per year."

The rule to be extracted from those cases is that mere compliance with what may be called the physical, commercial and literary tests prescribed by the statute (while absolutely essential to be complied with) is not alone sufficient to constitute a publication a "periodical" within the postal laws; but that the contents must be such as make it a periodical within the ordinary meaning of that term.

How then are we to distinguish between a periodical and other publications?

It is difficult to formulate any precise definition which will cover all cases, but as said in *Houghton* v. *Payne*, 194 U. S., 97, "while it may be difficult to draw an exact line of demarcation between periodicals and books it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue."

Without regard to any attempted definition, we think it must strike the mind that "dime novels" issued weekly do not constitute a periodical.

In the margin will be found a quotation from *Houghton* v. *Payne*, 194 U. S., 88, 97, where some of the distinctions between periodicals and books are pointed out, but the classification there given does

not pretend to be complete nor adequate to cover all cases.[1]

[1] In *Houghton* v. *Payne*, 194 U. S. 88, 97, it is said:

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel, or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

"The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding."

Of course there may be and doubtless are some publications which are universally conceded to be periodicals in the most genuine sense, and yet which in some one or more particulars may not conform to the suggestions in *Houghton* v. *Payne*. Nevertheless, a publication consisting solely of issues, each of which is a novel complete in itself and always of boyhood adventure, is not a periodical but a series of novels.

If (*a*) reprints of famous novels and poems, and of collections of dime novels, and (*b*) original articles upon great musicians, do not constitute a periodical, can it be said that a series of single detective stories—dime novels—is a periodical?

The only difference between the Riverside Series and the "Tip Top Weekly" is that one is a reprint and the other an original; and appellants urge that the cases of *Houghton* v. *Payne* and *Smith* v. *Payne* are distinguishable from the case at bar because they involved the *reprint* of previously published articles, whereas the "Tip Top Weekly" consists of original articles appearing for the first time in the current issue. But the original character of the composition can not be the test, for "Masters in Music" was, in large part at least, an original composition. (*Bates & Guild Co.* v. *Payne*, supra.)

It was not the *reprinting* feature that made the Riverside Series and the Medal Library books. It was the inherent nature of their contents. Their contents were books; originally books; always books, no matter how published or how disguised.

For example, Longfellow's "Evangeline" (one of the Riverside Series) was first published as a book. When republished in the series it was still a book, not *because* it was a reprint, but because it was originally and always a *book*. Suppose "Evangeline" had been first published in paper covers, dated and numbered as one issue of the series. Would it not have been a book just the same?

And, therefore, *reprinting* not being the determining factor, the cause of the exclusion in *Smith* v. *Payne*, 194 U. S., 104, of numbers of "Tip Top Weekly" issued in the Medal Library must have been because they were *books*. If the dime novel tales of Frank Merriwell's marvelous adventures were books in *Smith* v. *Payne*, why are not similar tales of his adventures books today?

Appellants' counsel urge that because the issues of those early publications ("*Spectator*," "*Tatler*," "*Rambler*") which originally gave the word "periodical" to the English language were chiefly by one author on one subject, *any* publication now by one author on one subject and issued at stated intervals is necessarily a periodical within the meaning of the postal laws (brief, p. 99 *et seq.*).

It does not so follow; both on account of the difference in the character of the contents, as will be presently pointed out, and because the word periodical has come to have a meaning to-day different from the characteristics of those first periodicals.

From the first monthly magazine established on this side of the Atlantic bearing the formidable title

of "*The General Magazine and Historical Chronicle of all the British Plantations in America,*" which Benjamin Franklin issued in 1741, down to the days of "Everybody's" the characteristic of American periodicals has been short miscellaneous contributions by a variety of authors. In 1851, Robert Bonner acquired the old New York *Ledger* (an old commercial paper), and at once excluding all news and business, he substituted a series of continued and short stories, each issue containing several. He had numerous contributors, such as Edward Everett, Wm. Cullen Bryant, Horace Greeley, Mrs. Stowe, and Henry Ward Beecher. He was enormously successful as the first person to combine a very cheap paper with an enormous circulation.

His success brought many imitators in the field; the next step being such publications as "*The Fireside Companion,*" containing one story that stopped at the most thrilling moment and was "continued in our next."

And so Bonner's idea has finally lapsed into the dime novel, which is a vilely written story of exciting adventure, whose eager purchasers are servant girls and office boys.

The Tip Top Weekly is one of that class, seeking by the subterfuge of a weekly issue to obtain the rates of postage that were designed only to apply to such publications as performed the real function of a periodical, to wit, the diffusion of knowledge among the people on matters of fairly current interest.

Apropos of the differences between novels and periodicals, it is to be observed that the distinguishing feature of the periodical is its current continuity. This is most marked in the daily newspaper. We read it and cast it aside, however interesting its collection of news or well written its editorials. It deals with passing events and it passes with those events. In a few large libraries it is filed away for the use of the future historian, but the general reader has no place in his home for the great folios that would result from binding his daily paper into permanent form. He simply awaits the next issue. So the best newspaper is as to each of its issues ephemeral because its subject matter is of transient concern. But it has continuity through its succession of issues.

Some things appropriate to a book may appear in a periodical without changing the nature of the publication under the postal laws. A daily newspaper may contain a chapter of a story or an entire story; it may contain selected matter from standard works of literature; or a great poem, destined to enduring renown, may first appear in its columns, as was the case with Kipling's Recessional. The newspaper is none the less, nay, it may be all the more, a newspaper by reason of these things, for that which has permanent interest has present interest also. And so with a magazine, as when parts of "The Autocrat of the Breakfast Table" first appeared in the Atlantic Monthly. But if the publication be simply of a

story, or of a poem, if the story or the poem constitute the publication, whether it is its first appearance or its tenth, it is not a periodical, but rather a book.

The magazine, as it is less frequent, is less transient in interest than the daily. It is neither written nor read in such haste. It remains longer upon the library table, more frequently finds its way to library shelves. Still its interest is transient, and in its topics we expect a certain timeliness. There may be, and in the magazines most familiar to us there is, literary matter which is not transient. Novels of the best writers may run through the numbers, to be afterwards published in book form, as Du Maurier's "Trilby" in Harper's Magazine; and in this way much of our poetry makes its first appearance. But this is only one feature of the literary magazines, and the use of generations has determined its propriety. But however much there may be in the magazine that is constant, there is much that is current. Matters of present, passing interest, although not so ephemeral as much which fills the columns of the daily papers, are dealt with, the progress of the arts and sciences, the changes in customs and manners, the flux of things. And this is true not only of the magazines of general scope, but as well of the journals of the trades and professions, and of the various cults and creeds, and of the journals of fads and fancies. Even the railway guide has this present, passing interest. However much it may repeat itself in its various issues, and even though during some months there should be no

change in any railway schedule in the United States, the current number is of present interest because it informs us what the schedules are now, and the preceding number has lost its interest because it deals with what is now past and may have been greatly changed.

The quarterly, as we would infer from its periods of publication, is a more serious journal. Nothing engages its attention which can not live throughout three months. But while its subjects are of deep, they are still of present, interest. Taking up at random a number of the North American Review—that of January, 1869, when it was still a quarterly—the contents were found to be very distinctly of contemporaneous interest, and running through the numbers upon either side of 1869 there was found a continuity of design and a certain individuality, not of authorship either, notwithstanding the great variety of topics treated.

Books, on the other hand, are supposed to be of more permanent interest, although they frequently are not, for thousands of stories have appeared in book form, even in a covering of full levant, and have gone to the paper mills, stripped of their covering, to be mashed into pulp, short lived, not because they were periodicals, but because they were *literary trash*, because they possessed nothing of permanent interest, while many a periodical, because it grasped the substantial in the passing show of life, has become a book.

A periodical may become a book, but a book can not become a periodical.

Appellants urge that the Weekly is a periodical because "the successive numbers deal with the same group or knot of characters, and are linked together in the usual way of fiction, by a sequence of events." (Appellants' brief, p. 108.) Conceding that to be true (although in point of fact each issue is finally complete in itself), it does not prove the Weekly to be a periodical.

The larger novels of Dickens, Thackeray, and Lever were originally issued serially in 20 monthly parts, and sold at a shilling the part. The green paper covered numbers of "Pickwick Papers," the yellow covered numbers of "Vanity Fair," and the pink ones of "Charles O'Malley," as they stand upon the shelves of collectors, present every outward semblance of periodicals as much as do the issues of "Tip Top Weekly" and "Work and Win." "Pickwick" is a book now, and it was a book when its monthly installments were so eagerly awaited by the Captain in Cranford and when for another good soul death was diminished in its terror, because of the physician's assurance that it would not come until there had been another coming of Sam Weller. Every number of the Papers was a book, incomplete indeed, but a book, as the "Mystery of Edwin Drood" is a book, although the pen of the author was forever stayed at the sixth number.

What is the difference between "Pickwick Papers," appearing at intervals of a month, and "Tip Top Weekly?" It seems like sacrilege to ask the question. But, remember, we are asking it only for

the purposes of postal classification, and for this purpose there is no difference; they are both books and not periodicals. And this is so, although Frank Merriwell is not very like Sam Weller.

And in response to the suggestion that because the Merriwell boys reappear in different issues, the Weekly is a periodical, we reply that Thackeray makes the Beatrix of Henry Esmond reappear as the Baroness Bernstein of the Virginians, and by the introduction of George Warrington in Pendennis exhibits to us descendants of Henry Esmond in the fifth generation. And something more there is of this reappearance of characters in Thackeray, but not a great deal. His genius was not equal to making one man the hero of five hundred stories. Dickens revived Pickwick and the Wellers in connection with another story, but he soon permitted them to retire and let the story of Little Nell run to its close without interruption. And though Pickwick and the Wellers were thus brought to life again in "Master Humphrey's Clock," the name under which "Old Curiosity Shop" and "Barnaby Rudge" were first published, and although the "Clock" appeared weekly and regularly for 80 weeks and in paper covers, it was not a periodical but a book.

So the mere reappearance of characters does not prove appellants' case. Sherlock Holmes appeared first in "A Study in Scarlet" in *Beeton's* Christmas Annual in 1886, but it was later published as a book when the interest of the people created the demand.

And so when, after that wonderful series of intricate cases, he disappeared over the Alpine precipice locked in the embrace of Professor Moriarty, the public were not satisfied and he reappeared in "The Adventure of the Empty House" to thrill us again with the story of his miraculous escape and to be of use in solving the mysteries of the "Second Stain," "The Dancing Men," the "Golden Pince-nez" and the "Hound of the Baskervilles." But the tales of Sherlock Holmes are books assuredly and not periodicals, even though in some instances they first appeared as one feature in (not the whole of) a magazine.

Indeed, the appearance of Frank Merriwell as the hero in five hundred different and complete stories of adventure, with no sign that the fancy from which the stories spring has lost its fertility, is conclusive that the stories are isolated tales of adventure, in which the incidents and not the individuals are of importance.

Each story is complete in itself, and is intended to be so. It is advertised and sold as such. We may begin reading anywhere in the series and end anywhere, and we may go forward or backward. The names in the stories have no significance. The "Work and Win" names would serve the "Tip Top Weekly" perfectly. Frank Merriwell and Fred Fearnot could change names and adventures as easily as caps and coats. The very number of the stories, several hundred, in which each so-called protagonist appears, demonstrates the want of individuality in the characters.

Appellants complain that certain other publications [Burr McIntosh Monthly, Masters in Art, Lippincott's Magazine, Advance Sheets, U. S. Supreme Court Reports, etc. (R. 69, 71; brief, p. 86, 104–107)] are admitted as second-class matter which are alleged to be substantially like the "Tip Top Weekly." Brevity forbids any lengthy explanation of the essential differences between the Weekly tales of Fred Fearnot's and the Merriwell boys' adventures in "Chasing the Chicago Stranglers," "Tracking the Train Wreckers," and being "Betrayed by a Blotter," and, for example, the reports of this court's decisions in the "Advance Sheets." The Government will leave the point for decision upon an inspection and comparison of the two publications; and despite appellants' suggestion on page 105 of their brief that it would be very extraordinary for the "Advance Sheets" to be designated "a variety of original articles by different authors," we have shared the common opinion that they were certainly by different authors and are sure that not a few unsuccessful litigants have at times even thought they were "original." In any event, it does not help appellants' case even if some other publication is erroneously admitted to the mails.

The presumption, of law and of fact, is that the Postmaster General has done his duty faithfully and impartially; that if there were other publications enjoying second-class privileges, when not entitled to them, the privileges have been withdrawn. The Postmaster General had to deal with each individual

case and decide that as his judgment of the merits required. He has done that in this case, and his action and the action of the Court of Appeals approving it should be affirmed.

The suggestion that the Postmaster General is estopped or bound by the action of his predecessors, and that he must accept their construction of the law as to what constitutes a periodical, is disposed of by *Houghton* v. *Payne*, and need not be discussed here.

Appellants erroneously assume that the Government's objection is because there is but one author of all the stories and only one story to an issue, and cite the "Spectator," "Tatler," and "Rambler," as instances of classic periodicals chiefly by one author and with but a single article to the issue. (Brief, p. 84, 100–104.) We do not deny the quality of "periodicals" to this weekly, because all the issues are written by one man. The "Tatler" was a periodical from the beginning, and while Steele was yet writing all the numbers, as much so as it was after he had called Addison to his aid, and as much so as were the "Spectator" and the "Guardian." As was said of Steele, "He brought his daily observations of life, his gleanings in society, his early studies, his critical estimates of authors and actors, and his reflections on the destiny and duty of his fellows, to bear on his essays—now drawing a pathetic picture, and now entering a satirical protest, advocating amelioration in manners, suggesting improved standards, winning to more wise pastimes and more gracious intercourse." The "Tatler," the "Specta-

tor," and the "Guardian," as their issues appeared, whether the number was written by Steele or Addison, or whether both contributed, were periodicals in the true sense. The contents made them so. They justified the motto—

> Whate'er men do, or say, or think, or dream,
> Our motley paper seizes for its theme.

There was in these publications the essential variety of everyday life, as much so as in the newspaper of today. Their high literary quality did not change their nature in that respect. The subject matter was of current and varied interest. The literary quality fixed that interest and made it constant, permanent.

The "Spectator" in its day, and as it appeared at its short, stated intervals was a periodical in form and in fact. It contained the important news, it commented upon the manners and morals of the time, and found its inspiration and its texts in passing events. The sequence of its numbers was a natural current one. Today the "Spectator" is a book and is published as one. And to republish it at the present time, serially and in its original sequence, would not make a periodical of it any more than to publish the "Decline and Fall of the Roman Empire" at regular intervals, in chapters, would make that a periodical. The number of the "Spectator" or the chapter of Gibbon would have no sort of relation to the interests of the time when it made its appearance. Publication in the original order of numbers or chapters would be essential to the use of either as a book, and for that reason the order would be observed.

That there is but one author of "Tip Top Weekly" does not make a periodical of the publication, because what he writes has no variety of topic. It is adventure and adventure, and nothing but imaginary adventure, each complete in itself. It is not devoted to literature, nor to any special branch of learning, nor to a special class of subjects. There is no relation of any one number with any prior or subsequent number of the same series.

And so it is that there is no occasion—not even that which would exist in the republication of the "Spectator"—for any particular sequence in the series. Look at the titles, not Tip Top Weekly No. 1, Tip Top Weekly No. 2, etc., but the real titles, those of the stories. They suggest no order. It makes no difference as to the particular date when Frank Merriwell solved the "Mysteries of the Mine," or "Snared the Sharpers," or was "Barnstorming in the Middle West," or succeeded in the "Finding of Elsie," or "Tracked the Train Wreckers." He could do them, or any of them, one day as well as another, and one week would serve as well as another for telling the story. The only element of unity in the series is the monotony of nomenclature, the result of sheer repetition; but this monotony does not give the continuity of literary character which makes the magazine or review.

The single number lacks the variety and the series the unity which are essential to constitute a periodical in the ordinary sense of the term. These things are books and complainants deal with them as such.

They publish back numbers, by reprinting them in book form and binding two or three numbers into one volume, the bound series being known as the "Medal Library." Here, then, we have the same thing published in book form and in periodical form. It is the same thing as to contents in both. And it is not like the "Spectator," a periodical which has become a book, whose interest, when published, was current, and from its literary quality and historic value has become constant. The bound volumes of the "Medal Library" are just as current to the boy who has not read them as is the last unbound issue of the Weekly. The volume of the "Medal Library" probably will not find as large circulation as the issue of the Weekly, but that is because it has been published before and has been read by many, and in this respect it does not differ from any other cheap novel.

The "Tip Top Weekly" deals with fiction, and only with fiction, and that is the subject matter of a great majority of the books which issue from the press of to-day. It appeals, as does every work of fiction, to the imagination. Its own peculiar appeal is to the imagination of youth, and its every issue makes the same kind of appeal. It has no current quality, and the interest of any and every issue is present only as it is ever present—perennial. And so we submit that each of these various tales of Frank Merriwell's adventures, as well as those of Fred Fearnot, is a book; and we believe we do no injustice to complainants when, adopting the language of this court in *Houghton* v. *Payne*, we say

that "the reason why books of the 'Tip Top Weekly' and 'Work and Win' series are issued periodically is too palpable to require comment or explanation."[1]

CONCLUSION.

The decrees below should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

AUGUST 15, 1912.

---

[1] The last ten pages of this brief were largely the work of the former Solicitor General, Frederick W. Lehmann.

O

SMITH AND OTHERS, TRADING UNDER THE FIRM NAME OF STREET & SMITH, APPELLANTS, *v.* HITCHCOCK, POSTMASTER-GENERAL.

FRANK TOUSEY, PUBLISHER, A CORPORATION, *v.* SAME.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 31, 32. Argued November 5, 6, 1912.—Decided November 18, 1912.

Even though a question of law be raised by an order of the Postmaster-General excluding matter from the mails, the court will not interfere unless clearly of the opinion that the order is wrong. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106.

Every series of printed papers published at definite intervals is not necessarily a periodical within the meaning of the provisions of the act of March 3, 1879, c. 180, 20 Stat. 355, defining second-class mail matter.

Books that are expressly embraced by § 17 of the act of March 3, 1879, as third-class matter and subject to the higher rate of postage cannot be made second-class matter by simply publishing them at regular intervals even though, as in this case, purporting to be a series of adventures of the same person. *Houghton* v. *Payne*, 194 U. S. 88.

"Periodical" as used in the act of March 3, 1879, implies that no single number of a series is a complete book in itself.

As a general rule, with few exceptions, a printed publication is a book within the meaning of § 17 of the act of March 3, 1879, when its contents are complete in themselves, deal with a single subject, need no continuation and have appreciable size; and so *held* that the publications involved in this case are books and not periodicals.

Where the point to be decided is a pure question of law which can be reviewed by the courts, the Postmaster-General satisfies the requirements of the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, by simply hearing the party claiming to be aggrieved by an order excluding matter from the mail; and one so heard and who is not prevented from offering material evidence cannot complain in the court reviewing the order that he was denied a hearing under the act.

34 App. D. C. 521 and 535, affirmed.

THE facts, which involve the validity of orders of the Postmaster-General excluding appellants' publications from second-class mail privileges, are stated in the opinion.

Mr. J. J. Darlington and *Mr. H. H. Glassie* for appellants:

The order excluding appellants' publication from the second class was not grounded on any provision of the statute, but upon superadded limitations not found therein. It is therefore void.

The exclusion of appellants' publications, whereby they are indirectly destroyed, cannot be justified upon the pretext of a personal literary and moral censorship unknown to the law. *Lewis Pub. Co.* v. *Wyman*, 152 Fed. Rep. 787, 792; *Weybridge* v. *Addison*, 67 Vermont, 569, 575; *Nat. Ry. Pub. Co.* v. *Payne*, 30 Wash. Law Rep. 341; *Wedderburn* v. *Bliss*, 12 App. D. C. 485, 493; *Garfield* v. *Spalding*, 32 App. D. C. 154, 158; *Myer* v. *Peabody*, 212 U. S. 78, 84; *Londoner* v. *Denver*, 210 U. S. 373, 385; 15 Op. Atty.-Gen. 346.

The exclusion was really grounded not on the act of March 3, 1879, but upon the amended regulation of July 17, 1901, already adjudged void. It is conceded that appellant's publication complies with every specified condition prescribed by this statute as a test for admission. There has been a long-continued and general acceptance of this publication as a periodical. The construction of the term "periodical" as accepted and acted on by the Post Office Department when appellant's publication was admitted is a construction contemporaneous with the act of March 3, 1879, itself, and thereafter followed for twenty years. That construction was, moreover, the established construction of the same term in prior postal statutes and, as such, was deliberately and studiously adopted by Congress in the framing of this act. *Mason* v. *Fearson*, 9 How. 248, 258; *Reiche* v. *Smythe*, 13 Wall. 162, 164; *The Abbottsford*, 98 U. S. 440, 444; *Claflin* v. *Commw. Ins. Co.*, 110

U. S. 90, 93; *New Haven R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361, 401; *United States* v. *Falk*, 204 U. S. 143, 152; *United States* v. *Hermanos*, 209 U. S. 337, 339; *White-Smith Co.* v. *Apollo Co.*, 209 U. S. 1, 14; *B. & O. Southwestern R. R.* v. *United States*, 220 U. S. 94, 103; *United States* v. *Press Publ. Co.*, 219 U. S. 1, 11; *Chesapeake & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238, 243; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 559; *Platt* v. *Union Pac. R. Co.*, 99 U. S. 48, 64; *Blake* v. *Nat. Banks*, 23 Wall. 307, 319; *Schell's Ex.* v. *Fauche*, 138 U. S. 562, 572; *United States* v. *Hill*, 120 U. S. 169, 180; *Hahn* v. *United States*, 107 U. S. 402, 406; *Butterworth* v. *United States*, 112 U. S. 50, 67; *Philbrick* v. *United States*, 120 U. S. 52, 59; *Bate Refg. Co.* v. *Sulzberger*, 157 U. S. 1, 44; *United States* v. *Haley*, 160 U. S. 136, 141, 145; *Hewitt* v. *Schultz*, 180 U. S. 139, 157; *Midway Co.* v. *Eaton*, 183 U. S. 602, 609; *United States* v. *Finnell*, 185 U. S. 236, 244; *United States* v. *Union P. R. Co.*, 91 U. S. 72, 79; *United States* v. *Freight Ass'n*, 166 U. S. 293, 318; *Chiles* v. *Ches. & O. Ry.*, 218 U. S. 71, 76; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Railway Pub. Co.* v. *Payne*, 30 Wash. Law Rep. 338; *Payne* v. *Railway Pub. Co.*, 20 App. D. C. 581; *Barden* v. *North. Pac. R. R.*, 154 U. S. 288, 322; *Kilbourn* v. *Thompson*, 103 U. S. 176, 196, 199; *Legal Tender Cases*, 12 Wall. 457, 554.

Irrespective of evidence as to intent of Congress, appellants' publication is a periodical in the ordinary meaning of the term.

The tests now set up by the Department are not within the *ratio decidendi* of *Houghton* v. *Payne*, but additions to the requirements of the statute.

The exclusion is not based upon any settled, definite or uniform construction of the statute; but arbitrarily discriminates between publications essentially similar. *Payne* v. *Houghton*, 22 App. D. C. 234, 239; *Houghton*

v. *Payne*, 194 U. S. 88, 98; *Ogden* v. *Saunders*, 12 Wheat. 213, 233; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 574; *Brooks* v. *Marbury*, 11 Wheat. 28, 91; *Carroll* v. *Carroll*, 16 How. 275, 287; *Wis. &c. R. R.* v. *Price Co.*, 133 U. S. 496, 509; *Hans* v. *Louisiana*, 143 U. S. 1, 20; *Cross* v. *Burke*, 146 U. S. 82, 87; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 679; *Downes* v. *Bidwell*, 182 U. S. 244, 259; *Harriman* v. *Nor. Securities Co.*, 197 U. S. 244, 291; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507; 27 Op. Atty.-Gen., p. 53.

The Postmaster-General has no power, by misconstruction of law, to take away from the citizen his positive legal right to have mail matter transported at the rate fixed by statute. Such mistake of law does not bind the courts or preclude their granting relief.

The right to post mail matter at the rates established by Congress is a fixed legal right which cannot be impaired by the act of an administrative officer. The definition of a word of common speech used as a statutory term is a pure question of law. *Smith* v. *Powditch*, 1 Cowper, 182; *Stock* v. *Harris*, 5 Burrows, 2711; *Rowning* v. *Goodchild*, 2 Wm. Black. 907, 910; *Barnes* v. *Foley* [1768], 4 Burrows, 2149; *Jones* v. *Walker* [1777], 2 Cowper, 624, 626; *Payne* v. *Ry. Pub. Co.*, 20 App. D. C. 581, 597, 599; *Morrill* v. *Jones*, 106 U. S. 466; *Teal* v. *Felton*, 12 How. 284, 291; *Am. School &c.* v. *McAnnulty*, 187 U. S. 109; *Sandford* v. *Sandford*, 139 U. S. 642, 647; *Quimby* v. *Conlan*, 104 U. S. 420, 426; *Moore* v. *Robbins*, 96 U. S. 530, 535; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Johnson* v. *Towsley*, 13 Wall. 72; *Silver* v. *Ladd*, 7 Wall. 217; *Roberts* v. *United States*, 176 U. S. 221, 231; *United States ex rel.* v. *West*, 19 App. D. C. 333; *Garfield* v. *Goldsby*, 211 U. S. 249, 261; *McCulloch* v. *Maryland*, 4 Wheat. 316, 413; *State* v. *Stevens*, 69 Vermont, 411; *Taylor* v. *Horst*, 52 Minnesota, 300; *Commonwealth* v. *Sullivan*, 146 Massachusetts, 142; *Marrel* v. *Merritt*, 116 U. S. 11.

The Solicitor General for the appellee.

The former Solicitor General, Mr. Frederick W. Lehmann, also filed a brief for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are bills to restrain the Postmaster-General from revoking orders according second-class mail privileges to the several plaintiffs—in the first named case in respect of a series of publications issued under the name of the Tip Top Weekly, in the second in respect of a similar one entitled Work and Win. The ground of the bills is that the privileges were annulled without granting the hearing required by the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, and that the publications are periodical publications within the meaning of the act of March 3, 1879, c. 180, §§ 7, 10, 14; 20 Stat. 355, 358, 359, and therefore must be carried as second-class matter, by the very terms of the law.

We will take up the second question first. The facts are not in dispute and are alike in the two cases. The publications are weekly, each containing a single story complete in itself, but the same character is carried through the series and the reader is led by announcements to expect further tales after the one before him. Most of the stories are by the same author. The element of sequence may be indicated by a few of the titles in the Tip Top Weekly: Frank Merriwell in Arizona; or, the Mysteries of the Mine. Frank Merriwell's Friend; or, Muriel the Moonshiner. Frank Merriwell's Double; or, Fighting for Life. Frank Merriwell Meshed; or, the Last of the Danites. Frank Merriwell's Magic; or, the Pearl of Tangier. Frank Merriwell in London; or, The Grip of Doom, etc., etc. There is nothing else in a number except a roll of honor or list of some of those who have

endeavored to increase the circulation of the series, laudatory letters with insignificant comments, and a page or two of inquiries as to physical culture purporting to come from readers, with short replies, all more or less incident to the muscular tenor of the tales. The publications measure about eleven by eight inches on the outside, are said to contain about thirty thousand words, have thirty-two pages, including a page of advertisement and exclusive of the cover, of which twenty-six are filled by the story. The front cover bears a colored illustration of some incident narrated within.

Thus a question of law is raised, although as suggested in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 108, we should not interfere with the decision of the Postmaster-General unless clearly of opinion that it was wrong. *Ibid.* 110. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 509. We have no such clear opinion, as the decision is pretty nearly if not wholly sustained by *Houghton* v. *Payne*, 194 U. S. 88, and *Smith* v. *Payne*, 194 U. S. 104. Indeed the latter case dealt with The Medal Library, which was a periodical publication of several issues of the Tip Top Weekly bound together; as the principal plaintiff now puts it, in book form, and it is true, reprinted in a different size and shape. Some attempt was made to reargue the law of the decisions just cited, but we do not feel called upon to reopen the discussion in that part of the appellants' brief.

It must be taken as established that not every series of printed papers published at definite intervals is a periodical publication within the meaning of the law, even if it satisfies the conditions for admission to the second class set forth in § 14. *Houghton* v. *Payne*, 194 U. S. 88, 96. It is established by the same authorities, that books, that are expressly embraced in mail matter of the third class by § 17 and so made liable to a higher rate of postage,

cannot be removed from that class and brought into the second by the simple device of publishing them in a series at regular intervals of time. It was suggested to be sure that the distinction was between reprints of well-known works and new matter, but we can see nothing in that; neither do we find much weight in the identity of authorship, the retention of the name of the hero through successive tales, or the ever renewed promise of further wonders in the next. All these might co-exist and yet each number might be a book, and if so it goes into the third class. "Mail matter of the third class shall embrace books." § 17.

The noun periodical, according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion if not a promise of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself. But we can approach the question more profitably from the other end, and shall have gone as far as we need when we decide whether the numbers exhibited constitute so many books. The word book also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present § 17. As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together. Without attempting a definition we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. There may be exceptions, as there are other instances of books. It hardly would be an exception if, where the object is information and the subject-matter is a changing one, a publication periodically issued giving information for

the time should be held to fall into the second class. From this point of view the Tip Top Weekly and Work and Win are books. They are large enough to raise no doubt on that score; each volume is complete in itself and betrays no inward need of more, notwithstanding that, as in the highwayman stories of an earlier generation, further adventures to follow are promised at the end.

The decision that these weeklies are books shortens what needs to be said as to the sufficiency of the hearing. The parties were notified that they would be granted a hearing at the office of the Third Assistant Postmaster-General, Washington, D. C., at a fixed day and hour, to show cause why the admission to the second class should not be revoked and the third class rate of postage charged, on the ground that the issues were not periodical publications but were books. They sent a representative to Washington who left a printed response in advance, asking for further opportunity for argument if the authorities were not satisfied, and who called at the appointed time. He was referred to the Chief of the Classification Division, the proper person. Rev. Stat., § 161. Postal Laws and Regulations, Ed. 1902, §§ 6, 19, subsect. 1, 8. He saw him and asked if the brief had been received, was answered yes and then asked if the other had any questions to ask and was answered no. He presented a pamphlet, 'The Influence of the Dime Novel' and departed, offering no further argument, seemingly somewhat aggrieved at not having seen the Third Assistant Postmaster-General in person. Subsequently, the Assistant Attorney-General for the Post Office Department was consulted by the officials and in accordance with his opinion the order was issued which the plaintiffs seek to restrain.

The matter was argued to us with some feeling, and it is not impossible that the interview gave an impression of official indifference. But the plaintiffs allege in their bills that the question was a pure question of law; it was a ques-

tion that they had a right to have reviewed and have had reviewed in this court; it was clearly defined; the official was not called on to state reasons or to discuss—his only duty was to hear, and beyond offering the printed brief the plaintiff's representatives showed no desire to be heard. This is not a case in which even by manner or indirection the plaintiffs were prevented from offering material evidence. The facts and the question were as plain then as now. The conclusion reached was right, and in the circumstances disclosed we are of opinion that the plaintiffs had no cause to complain.

Decrees affirmed.